In The

Supreme Court of the United States

October Term, 1977

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM and CHARLES LaPLANTE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

CONSTITUTION CITED

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—o—

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Petitioners, John B. Greenholtz, Eugene E. Neal, Catherine R. Dahlquist, Marshall M. Tate and Edward M. Rowley, pray for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 18, 1978.

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OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced herein as Appendix A. The decision of the district court, which has not been published, is reproduced herein as Appendix B.

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JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1978. A timely petition for a rehearing en banc was denied on June 9, 1978, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

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QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole by the Nebraska Board of Parole?

2. If the due process clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole, what procedures are constitutionally mandated?

3. Whether the procedures followed by the Nebraska Board of Parole comply with all constitutionally mandated procedures, if any?

STATUTES INVOLVED

The statutes involved are Nebraska Revised Statutes, §§ 83-192, 83-1,111, 83-1,112, 83-1,114, and 83-1,115. These sections are reproduced in full in Appendix C.

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STATEMENT OF THE CASE

This is a class action suit brought by inmates of the Nebraska Penal and Correctional Complex against the members of the Nebraska Board of Parole under the provisions of the Civil Rights Act, 42 U. S. C. § 1983. Various constitutional deprivations were alleged, so the district court appointed different inmates to represent the various classes, and appointed counsel for each class. Eventually the claims made by the different classes were treated as separate suits.

We are here concerned with the class claiming that they were denied procedural due process in the granting or denial of discretionary parole by the Board of Parole. The district court, after an evidentiary hearing, held that procedural due process applied to the parole release procedure, and that the Board of Parole had failed in certain respects to afford the inmates constitutionally required process. The court ordered certain procedures to be followed in the future.

On appeal, the Court of Appeals affirmed in part and reversed in part. It agreed that due process applied, but disagreed as to the exact procedures required. The

Court of Appeals found that the due process clause of the Fourteenth Amendment required that: (1) Every inmate receive a formal hearing upon first becoming eligible for parole, with subsequent hearings to be allowed in the discretion of the board. (2) Each inmate receive a written notice of the date and hour of the hearing reasonably in advance, the notice to contain a list of the factors which may be considered by the board in making its determination. (3) Subject to security considerations, every inmate be allowed to appear in person to present documentary evidence in support of his application. (4) A record of the proceeding which is capable of being reduced to writing be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole is denied be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

In Nebraska paroles are of two kinds, mandatory and discretionary. Mandatory parole is required to be given when the offender has served his maximum sentence less good-time credits. We are not concerned with that type of parole in this action. Discretionary parole may be given when the offender has served his minimum sentence less good-time credits. It is this type of parole which is the subject of this action.

Nebraska Revised Statutes, § 83-192(9) requires the board to review the record of every committed offender at least once each year, whether or not he is eligible for parole. This hearing is called a "parole review hearing," as is the hearing within sixty days before the expiration of the minimum sentence, mandated by

Neb. Rev. Stat. § 83-1,111. Paroles are never granted at parole review hearings.

If, after a parole review hearing, the board believes the inmate should be considered for parole, he is scheduled for a formal parole hearing. He is notified at least thirty days in advance that his parole hearing has been set for a certain month. Notification of the exact time is by posting of such information at the penitentiary. Prior to the hearing the offender must have a parole plan, and may have legal counsel in preparation for the hearing. See Neb. Rev. Stat. § 83-1,112. At the hearing the inmate may have counsel, and may present whatever evidence he wishes. He is not permitted to hear opposing witnesses or see letters opposing his release.

If an inmate is not scheduled for a parole hearing after a parole review hearing, he is notified of the decision by a form, which also informs him of the reasons for denial. If he is denied parole after a parole hearing, he is notified by letter, which contains the reasons for denial, although, as the Court of Appeals noted, in a very few cases between January 1975 and November 1976 the reasons for denial were not contained in the letters. The facts relied upon by the board in reaching its decision are not set forth in the letter.

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ARGUMENT

I.

This case involves a question in which there is a clear conflict among the various circuits.

The conflict among the circuits over the question of whether any constitutionally mandated procedures apply to parole release hearings was concisely summarized by Mr. Justice Stevens in his dissent in *Scott v. Kentucky Parole Board,* 429 U.S. 60, 50 L.Ed. 2d 218, 97 S.Ct. 342 (1976). He listed in footnote 1 cases from the Fifth and Sixth Circuits holding that due process does not apply, and from the Fourth, Second, Seventh, and D.C. Circuits holding that due process applies to the extent that written reasons must be given for denial of parole. He also listed *Burton v. Ciccone,* 484 F. 2d 1322 (8th Cir. 1973), as an implicit holding that due process does not apply. In view of the Eighth Circuit's holding in this case, however, we must conclude that that circuit did not so construe it, or that it has overruled the case *sub silentio.*

This case appears to be the beginning of a third line of cases, since it mandated procedures beyond those specified in the circuits holding due process applies. Previous cases have, in general, limited the required due process to a statement of reasons for denial of parole. We now appear to have a three-way split in the circuits on this issue.

This Court has frequently indicated its desire to resolve the conflict, since it has granted certiorari in a number of cases, only to vacate them as moot or remand them to consider mootness. Since we are here dealing with a class action, which cannot become moot upon the parole of a particular inmate, it would seem that this is an ideal case for the Court to accept to decide this important question.

II.

Procedural due process does not apply to parole release proceedings.

A petition for certiorari is not a proper place for an extensive argument on the merits. We will therefore make only a very sketchy argument herein.

The Court of Appeals relied heavily on *Morrissey v. Brewer,* 408 U.S. 471, 33 L.Ed. 2d 484, 92 S.Ct. 2593 (1972), *Wolff v. McDonnell,* 418 U.S. 539, 41 L.Ed. 2d 935, 94 S.Ct. 2965 (1974), and *Gagnon v. Scarpelli,* 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973). We submit that this reliance is misplaced, and that these cases are clearly distinguishable.

The court suggested that we tried to distinguish *Morrissey, Wolff,* and *Gagnon* on the basis of the distinction between loss of a privilege and denial of a privilege. It is true that some of the cases have made that distinction. See, e.g., *Brown v. Lundgren,* 528 F. 2d 1050 (5th Cir. 1976), and *Scarpa v. United States Board of Parole,* 477 F. 2d 278 (5th Cir. 1973), vacated and remanded to consider mootness, 414 U.S. 809, 38 L.Ed. 2d 44, 94 S.Ct. 79, dismissed as moot, 501 F. 2d 992 (1973). We believe that the argument has validity, but it was far from our main argument distinguishing the cases.

We submit that the primary distinction lies in the type of determination that is involved. In *Morrissey* the question to be determined was whether the parolee had violated the conditions of his parole by buying a car under an assumed name, operating it without permission, giving false statements to police, obtaining credit under an assumed name, and failing to report his place of residence to his parole officer. In *Wolff* the question was whether the inmate was guilty of the misconduct charged, which would trigger disciplinary action. In *Gagnon* the question was whether, while on probation, Scarpelli had committed a burglary, and whether his admission of having done so was made under duress and was false.

All of these are clear-cut factual issues, susceptible of proof and factual determination, one way or the other. In *Wolff v. McDonnell, supra,* this Court said:

> "Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

Contrast the factual determinations involved in *Morrissey, Wolff,* and *Gagnon* with the matters the Board of Parole is to consider pursuant to Neb. Rev. Stat. § 83-1,114. Under that section, almost all of the criteria for determination of whether the inmate shall be paroled are highly subjective, and not subject to "proof" in the traditional sense. What "proof" would one introduce that a particular inmate's release would or would not depreciate the seriousness of his crime or promote disrespect for law, or have an adverse effect on institutional discipline?

True, past disciplinary actions against him may be a factor in denial of parole. However, pursuant to *Wolff v. McDonnell* he will already have had a due process hearing in that connection, and his misconduct will have been determined and made a matter of record.

In short, to require each inmate who is eligible for parole to have a formal, due process evidentiary hearing, and to require the board to state the facts it relies on will only tend to divert attention from the statutory criteria to superficial matters such as participation in programs at the penitentiary, lack of violations of rules, etc. Furthermore, after such a hearing at which the prisoner presents his favorable evidence and hears no contrary evidence, he will be frustrated and infuriated if he is denied parole.

We believe that the cases of *Meachum v. Fano,* 427 U. S. 215, 49 L. Ed. 2d 471, 96 S. Ct. 2532 (1976), and *Montanye v. Haymes,* 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (1976), fully support our position. In *Meachum v. Fano* this Court held that the due process clause did not entitle a prisoner to a hearing upon a transfer from one prison to another "absent a state law or practice conditioning such transfer on proof of serious misconduct or the occurrence of other events." The Court distinguished *Wolff v. McDonnell* on that basis.

In *Montanye v. Haymes* this Court held that even if a transfer was for disciplinary purposes, procedural due process did not apply absent some right or justifiable expectation that he would not be transferred except for misbehavior or other specified events.

Misbehavior is susceptible of direct proof. Most of the criteria for determination of parole are not. Nowhere in Nebraska law is a prisoner assured that he will be paroled in the absence of misconduct or other specified events. We therefore submit that *Meachum v. Fano* and *Montanye v. Haymes* control, and that procedural due process does not apply.

III.

If procedural due process applies, the practice of the Board of Parole fully complies with all required procedures.

Those cases which have held procedural due process applies have usually limited it to giving the inmate a reason for denial. See *United States ex rel. Richerson v. Wolff,* 525 F. 2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914, 47 L.Ed. 2d 764, 96 S.Ct. 1511, *Childs v. United States Board of Parole,* 511 F. 2d 1270 (D.C. Cir. 1974), and *United States ex rel. Johnson v. Chairman, New York State Board of Parole,* 500 F. 2d 925 (2d Cir. 1974), vacated as moot sub nom. *Regan v. Johnson,* 419 U.S. 1015, 42 L.Ed. 2d 289, 95 S.Ct. 488. In *Franklin v. Shields,* 569 F. 2d 784 (4th Cir. 1978), cert. denied, April 24, 1978, the original panel had ordered more extensive procedures, but the court sitting en banc reversed the panel and limited the required procedures to a statement of reasons for denial.

The evidence is that after either a parole review hearing or a formal parole hearing the inmate is given written notice of reasons for denial. (There was evidence that in a period of almost two years, the letters

to eight of the inmates did not contain reasons. One of the eight inmates was not eligible because of loss of good time credits, one said at the hearing that he did not want a parole, and one did not attend the hearing, but sent a note waiving the hearing. A board member testified that failure to state reasons was a departure from the board's practice.) Furthermore, every inmate, whether or not eligible, is interviewed by the board at least once a year, and is also interviewed within sixty days before he becomes eligible. We submit that this more than complies with any required procedures.

It would be wasteful and burdensome to give every eligible inmate a formal parole hearing as soon as he becomes eligible for parole. Many of them, because of criminal records, institutional records, type of crime, or various other factors, have no real chance of early parole. Before a parole hearing, he must have a parole plan. See Neb. Rev. Stat. § 83-1,112. A valid parole plan would contain assurance of employment. Good-faith compliance with the court's order would require the parole counselors to prepare a parole plan, including lining up a job for a man who everybody knows is not going to be paroled.

A statement of the facts relied upon would, in many cases, be very difficult. Often the decision must be made on opinions and feelings of the board members about the inmate's character, the seriousness of his crime, and the chances, in view of the entire picture, that he will successfully complete a parole. To articulate "facts" upon which such decisions are made would be very difficult, particularly since there are five mem-

bers of the board, who might be reaching the same decision for different reasons.

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CONCLUSION

This case presents an opportunity for this Court to resolve a conflict among the circuits. It will not become moot. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY, Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 77-1889

Inmates of the Nebraska Penal and Correctional Complex, Richard C. Walker, William Randolph, Richard J. Leary, Robert L. Gamron, Frederick L. Grant, Wayne Goham and Charles LaPlante,

Appellees,

vs.

John B. Greenholtz, Individually, and as Chairman, Nebraska Board of Parole; Eugene E. Neal, Catherine R. Dahlquist, Marshall M. Tate, and Edward M. Rowley,

Appellants.

Appeal from the United States District Court for the District of Nebraska

Submitted: February 14, 1978

Filed: May 18, 1978

Before HEANEY and STEPHENSON, Circuit Judges, and BECKER,* District Judge.

STEPHENSON, Circuit Judge.

The defendants-appellants, members of the state of Nebraska Board of Parole (Board), appeal from the decision of the district court[1] in this class action suit

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* The Honorable William H. Becker, Senior United States District Judge for the Western District of Missouri, sitting by designation.

1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

arising under 42 U. S. C. § 1983. The district court held that the plaintiffs-appellees, inmates of the Nebraska Penal Complex (inmates), had been denied procedural due process by the Board in the Board's consideration of the inmates for suitability for parole.

This case raises the question of whether the due process clause of the Fourteenth Amendment to the United States Constitution extends to parole release determinations, and if so, whether the safeguards currently available under applicable Nebraska law are constitutionally adequate. We affirm that the due process clause applies to parole release proceedings. With respect to the specific procedural safeguards which the district court found were constitutionally required in such proceedings, we affirm in part, reverse in part, and remand.

The Nebraska Board of Parole consists of five members. The chairman and two members are full-time, and the other two members serve on a part-time basis. Neb. Rev. Stat. § 83-191. Under Nebraska law the Board is charged with the responsibility of determining whether and when an inmate should be released on discretionary parole. Neb. Rev. Stat. §§ 83-192, 83-1,114, 83-1,115. The Board is required by statute to review at least once a year the record of each convicted offender, whether or not eligible for parole, and to meet with him and counsel him concerning his progress and prospects for a future parole. Neb. Rev. Stat. § 83-192(9). These parole review hearings last an average of five to ten minutes

and the inmates are not allowed to present evidence or call witnesses in their behalf.

After the annual parole review hearing, each prisoner is sent a form which informs him whether or not he is to receive a formal parole hearing. If he does not receive a formal parole hearing the reasons for deferral at that time are stated and recommendations are made for correcting the deficiencies. Only those inmates who are eligible for discretionary parole are granted a formal parole hearing, but in some instances eligible inmates did not receive a timely formal parole hearing. Between July 1, 1975, and June 30, 1976, 327 formal parole hearings and 1,645 review hearings were held.

If the inmate is given a formal parole hearing, he is permitted to offer evidence in support of parole, and may be represented by retained counsel. He is not permitted to cross-examine or hear opposition witnesses. If he is denied parole after a formal parole hearing, he is so advised in person and by letter. Generally the letter advises him of the reasons for denial, although eight instances were found between January 1975 and November 1976 in which reasons were not contained in the letter.

Inmates are notified either at the time of their original confinement or at subsequent parole review hearings or formal parole hearings of the month during which their next hearing will be held. This general notification occurs from 30 days to 1 year in advance. Notification of the precise date and hour occurs through posting of such information at the penal complex on the date of the hearing.

In its order and memorandum opinion of October 21, 1977, the district court concluded that parole release proceedings must be conducted in accordance with certain due process requirements and that the Board's procedures failed to comply fully with those required procedures. The court further found that the inmates were not entitled to monetary damages, but did allow them to recover their costs, including reasonable attorney fees under 42 U.S.C. §1988.

The initial issue confronting this court is whether parole determination proceedings implicate a liberty interest of the inmates within the meaning of the due process clause of the Fourteenth Amendment. We are convinced that it does.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Our inquiry of whether the prohibitions of the Fourteenth Amendment apply begins with the Supreme Court case of *Morrissey v. Brewer,* 408 U.S. 471 (1972), where the Court held that the due process clause was applicable to proceedings resulting in revocation of parole. In *Morrissey,* the Court articulated the proper framework for analysis of the question of whether due process applies in a particular situation.

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is

> one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin,* 407 U.S. 67 (1972).

Morrissey v. Brewer, supra, 408 U.S. at 481.

The interest asserted by the inmates in this suit is the present right to be considered for parole in accordance with certain procedural safeguards.[2] Since the state is not required by the Constitution to provide parole for convicted offenders, the inmates' interest is aptly described as a privilege or a matter of grace. However, this distinction is no longer an acceptable basis for determining where the due process clause applies to a governmental action. Chief Justice Burger, speaking for a majority of the Court in *Morrissey v. Brewer, supra,* 408 U.S. at 481, stated: "As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege" '. *Graham v. Richardson,* 403 U.S. 365, 374 (1971)."

In the present case the Board attempts to distinguish *Morrissey* as well as *Wolff v. McDonnell,* 418 U.S. 539 (1974) (due process applies to prison disciplinary proceedings where good time credit may be lost), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) (due process applies to

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2 Since it is the manner of parole decision-making, not its outcome, that is challenged, the inmates did not present a complaint of the sort in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), for which the inmates' sole federal remedy is a writ of habeas corpus. *See Wolff v. McDonnell,* 418 U.S. 539, 553-55 (1974); *Bradford v. Weinstein,* 519 F. 2d 728, 733-34 (4th Cir. 1974), *vacated as moot,* 423 U.S. 147 (1975).

probation revocation proceeding), on the basis that those cases involved the loss of a privilege and here we are concerned with a denial of a privilege. That is a distinction without a real difference. *Bradford v. Weinstein,* 519 F. 2d 728, 732 and n. 3 (4th Cir. 1974), *vacated as moot,* 423 U. S. 147 (1975).

> [The] present enjoyment of a protectable interest is not a prerequisite of due process. See Goldsmith v. Bd. of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926) (right of C. P. A. to practice before the Board of Tax Appeals); Willner v. Committee on Character and Fitness, 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), and Schware v. Board of Bar Examiners, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (admission to the bar); Speiser v. Randall, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (right to a tax exemption).

Bradford v. Weinstein, supra, 519 F. 2d at 732 n. 3. *But see Brown v. Lungren,* 528 F. 2d 1050, 1052-53 (5th Cir.), *cert. denied,* 429 U. S. 825 (1976). While the parole applicant's status is not changed by denial of his application, "in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of a Board determination which if favorable would have changed the status to one of greater liberty." *Childs v. United States Board of Parole,* 511 F. 2d 1270, 1280 (D. C. Cir. 1974). The nature of the interest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration—and thus the Fourteenth Amendment applies to both.

The Board also claims that parole release determination should be treated differently than the determinations involved in *Morrissey, Gagnon,* and *Wolff* because in these latter cases the respective boards were required to make factual determinations and therefore hearings were appropriate. However, Neb. Rev. Stat. § 83-1,114 provides that a prisoner eligible for parole is to be released on parole unless he is found to be unfit for one of the reasons listed in the statute. Thus, the Board's decision of whether to grant parole necessitates a factual determination of whether the statutory criteria are present.

The deprivations which result from revocation of a conditional liberty enjoyed by a parolee described in *Morrissey v. Brewer, supra,* 408 U. S. at 481-82, demonstrate the serious effects of denial of parole. Although a parolee is subject to many restrictions not applicable to other citizens, he is able to do a wide range of things available to persons who have never been convicted of a crime. "Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer, supra,* 408 U. S. at 482.

Since the protection of the due process clause extends to parolees, it may not be denied to inmates. While lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, an iron curtain is not drawn between the prisons of this country and the Constitution. *Wolff v. McDonnell, supra,* 418 U. S. at 555-56. Prisoners may not be deprived of life, liberty, or property without due process of law. *Id.* at 556.

The inmates are not the only ones with an interest in seeing that the parole determination proceedings are

conducted in accordance with the due process clause. The Supreme Court recognized in *Morrissey v Brewer, supra,* 408 U. S. at 484, that society has a stake in the effort to restore the prisoner to a normal and useful life within the law. Thus, society has an interest in not having release on parole denied because of an erroneous determination. Society has a further interest in treating the prisoner with basic fairness. Fair treatment in parole determinations "will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.*

Of the six circuit courts of appeals which have decided the issue, four have held that the Fourteenth Amendment does apply to parole determination proceedings. *Franklin v. Shields,* 569 F. 2d 784, 800 (4th Cir. 1978) (en banc); *United States ex rel. Richerson v. Wolff,* 525 F. 2d 797 (7th Cir. 1975), *cert. denied,* 425 U. S. 914 (1976); *Childs v. United States Board of Parole, supra*; *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole,* 500 F. 2d 925 (2d Cir.), *vacated as moot,* 419 U. S. 1015 (1974). *Contra, Scott v. Kentucky Parole Bd.,* No. 74-1899 (6th Cir. Jan. 15, 1975), *vacated and remanded to consider mootness,* 429 U. S. 60 (1976), *on remand sub nom. Bell v. Kentucky Parole Bd.,* 556 F. 2d 805 (1977); *Scarpa v. United States Bd. of Parole,* 477 F. 2d 278 (5th Cir.) (en banc), *vacated and remanded to consider mootness,* 414 U. S. 809, *dismissed as moot,* 501 F. 2d 992 (5th Cir. 1973).

The Supreme Court has not decided the exact question before us of whether a prisoner's interest in prospective parole is an interest to be afforded protection under the due process clause of the Fourteenth Amendment. It

must be acknowledged that there are indications both ways in recent Supreme Court opinions. *See discussion, Williams v. Ward,* 556 F. 2d 1143, 1157-58 (2d Cir. 1977), *cert. dismissed,* — U. S. —.

The Board primarily relies on the companion cases of *Meachum v. Fano,* 427 U. S. 215 (1976), and *Montanye v. Haymes,* 427 U. S. 236 (1976), for its contention that parole determinations do not implicate the Fourteenth Amendment. In *Meachum,* the Supreme Court held that the due process clause did not entitle a prisoner to a hearing when he is transferred from one prison to another, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.

We are not persuaded that the holdings of those cases are applicable to the present case. First, *Meachum* involved a transfer only from one prison to another, albeit with less favorable conditions, while here the Board's determination results in either conditional liberty or incarceration. Second, the holding of *Meachum* expressly excludes situations where a right was created by state law. The inmates' interest in this case is the right to be considered for parole, a right created by Nebraska law.

In *Wolff v. McDonnell, supra,* 418 U. S. at 558, the Court held that a person's liberty interests may be protected by the Fourteenth Amendment even when the liberty itself is a statutory creation of the state. The Court found that where the state had created a statutory right for a prisoner to have his sentence shortened for good conduct, and also specified that it was to be forfeited only upon serious misbehavior, the prisoner's interest was

within the liberty protected by the Fourteenth Amendment. Therefore, we must examine the Nebraska statutes governing parole release determinations to ascertain if they create a liberty interest.

Under Nebraska law, every committed offender is eligible for parole upon completion of his minimum term less reductions granted for good conduct. *See* Neb. Rev. Stat. §§ 83-1,105, 83-1,110. The Board of Parole has the duty to determine the time of release on parole of committed offenders eligible for such release and to fix the conditions of parole. Neb. Rev. Stat. § 83-192. The Board is further authorized to issue subpoenas, compel the attendance of witnesses, and the production of documents, and to administer oaths and take testimony. Neb. Rev. Stat. § 83-195.

Every committed offender is entitled to a hearing within 60 days before he is eligible for parole and when parole is not granted the Board is required to provide written notification of the reasons for denial. Neb. Rev. Stat. § 83-1,111. Section 83-1,111 further provides that if parole is denied the committed offender shall receive at least once a year a hearing at which his application is reconsidered. Neb. Rev. Stat. § 83-1,115 lists the items which are to be considered by the Board in making its determination of whether to release a prisoner on

parole. Finally, the Board is directed by Neb. Rev. Stat. § 83-1,114[3] to release an eligible prisoner on parole unless

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3 Neb. Rev. Stat. § 83-1,114 provides in full:

Board of Parole; deferment of parole; grounds. (1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(Continued on next page)

it finds that release should be deferred due to one of the reasons specified in the statute. Section 83-1,114 also lists the factors to be considered by the Board in making this determination.

An examination of Nebraska law reveals that the inmates have a right to be considered for parole, and this right is protected by procedural safeguards created by statute. In *Wolff*, where the state created the statutory right of shortened sentences for good behavior, the Supreme Court held such good behavior credits were to be withdrawn only when certain constitutional safeguards were adhered to. It follows that since Nebraska has made parole an integral part of its penological system and pro-

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(Continued from previous page)

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

vided that those eligible for parole are to be released on parole unless one of the reasons for denial specified in the statute is found to be present, the authority to deny parole must not be exercised arbitrarily. Neb. Rev. Stat. § 83-1,114 provides the inmates with a justifiable expectation rooted in state law that they will be conditionally released if they meet the statutory standards. Consequently, the Fourteenth Amendment due process clause is implicated. *See Wolff v. McDonnell, supra,* 418 U. S. at 557. *Compare Meachum v. Fano, supra,* 427 U. S. at 228; *Montanye v. Haymes, supra,* 427 U. S. at 242.

We agree with the reasoning of the original panel opinion in *Franklin v. Shields*, 569 F. 2d 784, 789-90 (4th Cir. 1977), *rev'd en banc*, 569 F. 2d 800 (4th Cir. 1978) (reversed upon the grounds that "the only explicit constitutional requisite is that the Board furnish to the prisoner a statement of its reasons for denial of parole"), where it was stated that:

> Since the [state] statutes contemplate that a prisoner who has satisfied all the requirements for parole will be conditionally released, the Board's investigation and review are crucial. A prisoner has much at stake in properly conducted parole proceedings, for they may result in his conditional freedom. If the proceedings are flawed—even unintentionally and in good faith, through reliance on incomplete or incorrect information—they may add years to a prisoner's confinement. Consequently, the accuracy and the sufficiency of the information the Board obtains in its investigation, which the statutes require, can have a decisive effect on parole. Also, whether the Board's review is full and fair, as contemplated by the statutes, may be a determinative factor in the grant or denial of parole. Therefore, we hold that the statutes governing the manner in which a prisoner

shall be considered for parole confer on the prisoner an interest in liberty. [Footnote omitted.]

In summary, we find that a prisoner in Nebraska has a statutory right to fair parole consideration. Because this right involves the prisoner's liberty interest, the inmate's right to consideration for parole is an aspect of liberty to which the protection of the due process clause extends. Therefore, the minimum requirement of procedural due process appropriate for the circumstances must be observed.

Having concluded that the due process clause is applicable to parole release proceedings, the question remains how much process is due. In this inquiry we are guided by the Supreme Court's observations in *Morrissey v. Brewer, supra.*

> It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961).

Morrissey v. Brewer, supra, 408 U. S. at 481. This balancing test was further refined in *Mathews v. Eldridge*, 424 U. S. 319, 334-35 (1976). The Court stated that:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The inmates' interest is the avoidance of arbitrary denial of parole when all of the requirements for release are satisfied. This is indeed a grievous loss. Although the severity of the loss is not a factor in determining whether governmental action implicates the Fourteenth Amendment, it is a factor when considering the extent to which procedural safeguards are required. *Meachum v. Fano, supra,* 427 U. S. at 224; *Goss v. Lopez*, 419 U. S. 565, 575-76 (1975); *Board of Regents v. Roth*, 408 U. S. 564 (1972); *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra,* 500 F. 2d at 928.

On the other hand the Board has a substantial interest in releasing a prisoner on parole at the appropriate time. Society suffers both when the prisoner is released before he is fully rehabilitated and when he is kept in prison beyond the time when all purposes of incarceration have been served. Thus, the Board has an interest in seeing that parole is neither granted nor denied on the basis of inaccurate information or an erroneous evaluation. The Board has additional interests. It must be concerned that the procedures adopted do not interfere with the security of the institution or undermine discipline of the prisoners. It must also be concerned about the increased administrative burdens and costs occasioned by the procedural safeguards.

The task facing this court is to ascertain the minimal requirements of fundamental fairness by balancing the interests of the inmates in their statutorily granted expectation of meaningful consideration for parole and the interests of the state and society in the orderly administration of the parole system.

We agree with the district court that a parole decision is not a part of a criminal prosecution and the full panoply of rights due a defendant in such proceedings does not apply. *See, e.g., Franklin v. Shields*, 569 F. 2d 784, 800 (4th Cir. 1978) (en banc); *Haymes v. Regan*, 525 F. 2d 540 (2d Cir. 1975). *See also Wolff v. McDonnell, supra*, 418 U. S. at 556; *Morrissey v. Brewer, supra*, 408 U. S. at 482 n. 8. However, as to the precise procedural safeguards required by the due process clause, we agree completely with neither of the parties nor the district court. We find that the procedures currently employed by the Board are in certain respects constitutionally deficient but the procedures required by *Wolff v. McDonnell, supra*, need not be followed in all respects in parole decisions in state prisons. With the interests of the inmates and state in mind, we will now consider each of the procedural protections required by the district court.[4]

In its decision of October 21, 1977, the district court ordered that "[e]very inmate eligible for parole under Nebraska law must be afforded a formal parole hearing." At a minimum, once it is determined that an interest is

4 We note that the procedural protections required by this opinion are applicable only to inmates who are eligible for parole. We do not discourage Nebraska from conducting annual record reviews for all prisoners, see Neb. Rev. Stat. § 83-192(9), but this case only concerns those prisoners that are eligible for parole.

protected by the due process clause, a hearing for the person affected is required. *See Wolff v. McDonnell, supra,* 418 U. S. at 557-58; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). The inmates contend that the district court required that all inmates eligible for parole be given a formal parole hearing annually. Although the district court's opinion is arguably ambiguous on this point, we understand it to only require a formal parole hearing upon an inmate's first becoming eligible for parole. In any event, we hold that to comply with the due process clause the Board has to provide a formal parole hearing only when the inmate first becomes eligible for parole. Subsequent formal parole hearings need be held only in the discretion of the Board. We, of course, do not discourage the Board from offering more frequent formal parole hearings.

The second minimum requirement imposed by the district court concerns the notice to be given to the inmates. It provides that:

> At least seventy-two hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole.

This standard actually contains two separate requirements. Initially, we have no hesitation in deciding that the due process clause entitles the inmates to receive reasonable written notice of the date and hour for the hearing. *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U. S. at 313. Under normal circumstances we

believe that a minimum advance notice of 72 hours, as mandated by the district court, allows the prisoner a fair opportunity to prepare for his appearance before the Board. Thus, the current practice followed by the Board of posting notice of the hearing at the institution on the day of the hearing is constitutionally infirm.

We also agree with the district court that the notice of the hearing must be accompanied by a listing of the criteria governing the Board's parole decisions. It is only fair to apprise the inmates of the standards to which they must conform if they are to be released on parole. Moreover, the Board offers no justification for not providing this information to the inmates. *See Franklin v. Shields*, *supra*, 569 F. 2d at 791-93; *Childs v. United States Board of Parole*, 371 F. Supp. 1246, 1247-48 (D. D. C.), *aff'd*, 511 F. 2d 1270 (D. C. Cir. 1974) (no appeal taken on this point); *Cooley v. Sigler*, 381 F. Supp. 441, 444 (D. Minn. 1974). *Contra, Haymes v. Regan*, 525 F. 2d 540 (2d Cir. 1975). Neb. Rev. Stat. § 83-1,114[5] lists the four reasons for which parole may be denied to an eligible prisoner. This section also provides 14 factors to be considered by the Board in making its decision of whether parole should be granted. We find that the statutory criteria are sufficiently specific to enable the inmate to prepare his presentation to the Board. *See Franklin v. Shields*, *supra*, 569 F. 2d at 791-92. We reiterate that a list of the factors considered by the Board must accompany the notice of a hearing given to the prisoner, or preferably by posting the statutory criteria and guidelines in the institutions in a place or places where the inmates will have access to them.

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5 See note 3, *supra*.

The district court also found that to comply with the due process clause "[e]ach inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations." In its memorandum opinion the district court held, in reliance on *Wolff v. McDonnell*, *supra*, that this standard included the right to call witnesses subject to prison security considerations and the need to keep the hearing within limits. We affirm only in part. Subject to prison security considerations an inmate must be allowed to appear in person before the Board and to present documentary evidence in support of his application for parole. *Wolff v. McDonnell*, *supra*; *Mullane v. Central Hanover Bank & Trust Co.*, *supra*. This means that in many cases it will be desirable for the Board to give the applicant sufficient notice to secure documentary evidence directed to the Board's function of predicting whether parole will be successful.

Under Nebraska law a prisoner has a right to be considered for parole on the basis of certain statutory specifications. To make this right effective a prisoner must be given the opportunity to personally appear before the Board to explain and amplify the information on which the Board will base its decision. The administrative inconvenience and cost of a personal hearing is not sufficient to deprive the prisoner of this right. Moreover, a personal hearing is also beneficial to the Board and society insofar as the reliability of parole decision-making is enhanced by personal hearings. However, in the absence of exceptional circumstances the prisoner does not have a constitutional right to call witnesses in his behalf

in a formal parole hearing. Nevertheless, the Board in its discretion may permit the prisoner to call witnesses. In fact the record shows that currently the Board does allow a prisoner afforded a formal parole hearing to have witnesses. It follows from our holding that a prisoner does not have a constitutional right to confront and cross-examine adverse witnesses. *See Wolff v. McDonnell, supra*, 418 U. S. at 566-69.

The order of the district court decreed that "[a] record of the proceedings at the parole hearing must be maintained." It appears from the district court's reliance on *Wolff v. McDonnell, supra*, 418 U. S. at 565, in its memorandum opinion that this standard requires that a written record of the proceedings be maintained. Currently a record of the hearings is maintained by the Board in the form of tape recordings. We find that this method is constitutionally adequate provided that the recordings are of sufficient quality to enable the record to be reduced to writing.

The final requirement ordered by the district court is that "[w]ithin a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole." We affirm. Every circuit which has held that the due process clause is applicable to parole release determinations has found that the parole board must inform the prisoner in writing of the reasons for denial of his application for parole. *See Franklin v. Shields, supra*; *United States ex rel. Richerson v. Wolff, supra*; *Childs v. United States Board of Parole, supra*; *United States ex*

rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra. See also Wolff v. McDonnell, supra, 418 U. S. at 564-65.

We agree with the reasoning of the Second Circuit that for a statement of reasons to satisfy minimal due process requirements "detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision * * * and the essential facts upon which the Board's inferences are based * * *." *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra*, 500 F. 2d at 934. *See United States ex rel. Richerson v. Wolff, supra; Cooley v. Sigler, supra*, 381 F. Supp. at 443; *Candirini v. Attorney General*, 369 F. Supp. 1132, 1137 n. 8 (E. D. N. Y. 1974). *Cf. Franklin v. Shields, supra*, 569 F. 2d at 797-98 n. 59, 801. The present practice of the Board is deficient in that an inmate is not informed as to the essential facts relied on by the Board in reaching its decision.

Providing a prisoner with the reasons for denial and the essential facts relied on will serve at least four purposes. Firstly, it will facilitate judicial review in those situations where it is allowed. Secondly, it will promote thought by the Board members and will compel them to cover the relevant points and eschew irrelevances. Thirdly, it will promote the goal of rehabilitation by relieving the inmates' frustration by instructing them how they might be improving their prison behavior or taking steps with respect to some other factor (e.g., prospective employment or housing), better their chances for release. In some situations a prisoner is not considered fit for

parole because of a factor such as a long history of recidivism which the prisoner will not be able to remedy even if the Board states its reasons in writing. Nevertheless, a statement of reasons is important in those situations because it will show that the Board has not acted arbitrarily. Finally, by requiring the Board to state its reasons for denial a body of rules, principles and precedent which will promote consistency by the Board will be established. *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra*, 500 F. 2d at 929, 931-33; *Cooley v. Sigler, supra*, 381 F. Supp. at 443. *See also Childs v. United States Board of Parole, supra*, 511 F. 2d at 1281-84; *Mower v. Britton*, 504 F. 2d 396, 398-99 (10th Cir. 1974); *King v. United States*, 492 F. 2d 1337, 1340-42 and n. 11 (7th Cir. 1974).

In summary, considering the Nebraska statutes governing parole and after weighing the interests of both the state and the prisoners, we conclude that as a minimum the due process clause of the Fourteenth Amendment requires the following: (1) Every inmate is to receive a formal parole hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the Board. (2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the Board in making its determination. (3) Subject to security considerations, every inmate is allowed to appear in person before the Board and present documentary evidence in support of his application. In the absence of unusual circumstances an inmate does not have a constitutional right to call witnesses in his behalf. (4) A record of the proceedings

which is capable of being reduced to writing must be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

The district court by its order of January 4, 1978, allowed an award of attorney fees of $3,000, plus expenses of $212.77, to be included as part of the taxation of costs against the Board under the provisions of 42 U. S. C. § 1988. We follow the ruling of this court in *Finney v. Hutto*, 548 F. 2d 740, 742 (8th Cir.), *cert. granted*, 98 S. Ct. 295 (1977) (No. 76-1660), that the Eleventh Amendment does not prohibit an award of attorney fees under section 1988 against a state agency although it is not a named party to the lawsuit. The district court did not abuse its discretion in awarding fees to the inmates in this case. *See Wharton v. Knefel*, 562 F. 2d 550 (8th Cir. 1977). Accordingly, we affirm the award of attorney fees against the members of the Board in their official capacities.

The decision of the district court is affirmed in part, and reversed in part. The case is remanded to the district court which in turn should remand to the Board of Parole for the purpose of drawing up regulations implementing the guidelines set out in this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Plaintiffs,

vs.

JOHN B. GREENHOLTZ,
Individually and as Chairman,

NEBRASKA BOARD OF PAROLE, et al.,

Defendants.

Civ. 72-L-335

MEMORANDUM OPINION

Filed October 21, 1977

This suit raises an important question of first impression in this district: whether the due process clause of the Fourteenth Amendment of the United States Constitution extends to parole release determinations, and if so, whether the safeguards currently available under applicable Nebraska law are constitutionally adequate.

Plaintiffs, inmates at the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, bring this class action under 42 U. S. C. § 1983[1] alleging that their consti-

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1 42 U. S. C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

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tutional right to due process is being violated in consideration of their eligibility for parole and work release. The named parties defendant are the members of the State of Nebraska Board of Parole (hereafter referred to collectively as the Board).[2] Plaintiffs argue that the procedures of the defendants violate due process in the following particulars:

1) Failing to inform the inmates of the criteria which they must meet to obtain a parole or work release;

2) Failing to inform the inmates in advance of the date and time of their hearings before the Board of Parole;

3) Failing to permit inmates to present evidence and call witnesses in their own behalf;

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> Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2 This action was originally filed as a class action alleging unlawful denial of parole or work release because members of the plaintiff class had exercised their right of access to the courts, denial of parole or work release because of racially discriminatory reasons and violations of due process in the process of determinations on parole and work release. The court dismissed the due process claims and the matter proceeded to judgment on the other claims of the plaintiff class. On July 14, 1976, this court on its own motion vacated the order dismissing the due process claims, appointed counsel to represent the plaintiff class and began processing of the claim as a separate lawsuit. The matter has now been tried to the court and this memorandum constitutes the findings of fact and conclusions of law mandated by Fed. R. Civ. P. 52(a).

4) Failing to confront the inmates with evidence presented opposing their release on parole or work release;

5) Failing to give the inmates the right to cross-examine witnesses appearing before the Board of Parole in opposition to the inmates' release on parole or work release;

6) Failing to maintain a complete and permanent record of all proceedings held in considering release of inmates on parole or work release;

7) Failing to permit full representation of inmates by legal counsel in the proceedings had by the Board of Parole and to provide such counsel upon a showing of indigent status;

8) Failing to provide inmates denied parole or work release with specific written reasons why such parole or work release was denied; and

9) Failing to inform inmates denied parole or work release of the evidence relied upon in reaching the decision.

Plaintiffs request injunctive relief requiring the Board to correct the above-alleged deficiencies and also request damages.

At the outset the court points out that under Nebraska law,[3] the Board has no authority to grant work release

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3 Neb. Rev. Stat. § 83-184 (Reissue 1976) provides in pertinent part:

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status to any inmate. Although the Board may make a recommendation in this regard, the ultimate decision rests solely with the Director of Correctional Services. "The director may refuse to release a prisoner for work under the statute notwithstanding a favorable recommendation by the Board of Parole." *Housand v. Sigler,* 186 Neb. 414, 416, 183 N. W. 2d 493, 494 (1971). As noted above, the only named defendants herein are the members of the Board. Plaintiffs have failed or elected not to join as a party to this action the state officer (Director of Correctional Services) charged with the responsibility and authority to grant or deny work release. To enter or enforce a judgment against a person not before the court would clearly violate due process of law. *See, e. g., Hanson v. Denckla,* 357 U. S. 235 (1958); *Pennoyer v. Neff,* 95 U. S. 714 (1878). Accordingly, this portion of plaintiffs' claim will be dismissed for failure to join the Director as a defendant without whose presence the injunctive relief and damages sought cannot be obtained.

(Continued from previous page)

(1) When the conduct, behavior, mental attitude and conditions indicate that a person committed to the department and the general society of the state will be benefited, and there is reason to believe that the best interests of the people of the state and the person committed to the department will be served thereby, in that order, and upon the recommendation of the Board of Parole in the case of each committed offender, the Director of Correctional Services may authorize such person, under prescribed conditions to:

* * *

(b) Work at paid employment or participate in a training program in the community on a voluntary basis * * *.

The primary issue raised herein is whether any constitutionally mandated procedural safeguards apply to procedures resulting in determination regarding an inmate's release on parole. We hold that certain procedural safeguards are constitutionally required as spelled out hereinafter.

Initially we note that a conflict over this issue presently exists among the various Courts of Appeal. *See Childs v. United States Board of Parole,* 511 F. 2d 1270 (D. C. Cir. 1974) (due process applies to the extent that reasons must be given for denial of parole); *United States ex rel. Johnson v. Chairman, New York State Board of Parole,* 500 F. 2d 925 (2d Cir.) (due process applies to the extent that reasons must be given for denial of parole), *vacated as moot, sub nom Regan v. Johnson,* 419 U. S. 1015 (1974); *Bradford v. Weinstein,* 519 F. 2d 728 (4th Cir. 1974) (due process applies although the extent thereof undecided), *vacated as moot,* 423 U. S. 147 (1975); *United States ex rel. Richerson v. Wolff,* 525 F. 2d 797 (7th Cir. 1975) (due process applies to the extent that a written statement of reasons must be given for denial of parole), *cert. denied,* 425 U. S. 914 (1976); *Scarpa v. United States Board of Parole,* 477 F. 2d 278 (5th Cir.) (*en banc*) (due process does not apply), *vacated and remanded to consider mootness,* 414 U. S. 809 (1973), *dismissed as moot,* 501 F. 2d 992; *Brown v. Lundgren,* 528 F. 2d 1050 (5th Cir. 1976) (due process does not apply); *Scott v. Kentucky Board of Parole,* No. 74-1899 (6th Cir. Jan. 15, 1975) (unpublished order holding that the requirements of due process are not applicable to parole release hearings), *vacated and remanded to consider mootness,* 429 U. S. 60 (1976) (on remand — F. 2d —, June 7, 1977).[4]

The Fourteenth Amendment prohibits any state from depriving a person of life, liberty or property without due process of law.

> Application of this prohibition requires the familiar two stage analysis: we must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property;" if protected interests are implicated, we must then decide what procedures constitute "due process of law." (Citations omitted.)
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> *Ingraham v. Wright,* — U. S. —, 45 U. S. L. W. 4364, 4369 (No. 75-6527, April 19, 1977).

Following that analysis here, the initial inquiry is whether the denial of discretionary parole deprives or implicates an interest of plaintiffs within the meaning of the due process clause.

"[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents v. Roth,* 408 U. S. 564, 570-71 (1972). *See also*

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4 *See also King v. United States,* 492 F. 2d 1337 (7th Cir. 1974), which held that the United States Board of Parole is obligated under the Administrative Procedure Act, 5 U. S. C. § 555(e) to give a statement of grounds for denial of parole. The court, however, further noted:

> (A) substantial argument can be made that some modicum of due process attend the denial of the expectation of conditional freedom on parole inasmuch as its determination after having been granted inflicts a "grievous loss" of a "valuable liberty."
>
> *Id.* at 1343.

Ingraham v. Wright, supra, — U. S. at —, 45 U. S. L. W. at 4370; *Meachum v. Fano,* 427 U. S. 215, 223-24 (1976).

The Supreme Court has addressed the nature of an inmate's interest encompassed within the due process clause in a trilogy of recent decisions: *Morrissey v. Brewer,* 408 U. S. 471 (1972); *Gagnon v. Scarpelli,* 411 U. S. 778 (1973); and *Wolff v. McDonnell,* 418 U. S. 539 (1974).

In *Morrissey,* the due process clause was held applicable to proceedings resulting in revocation of parole. The Court discussed the substantial function of parole in the correctional process.

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968). Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.
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> 408 U. S. at 477. (Footnote omitted.)

More importantly, however, the Court examined the parolee's interest in conditional liberty.

> We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked. 408 U. S. at 481-82 (Footnotes omitted.)

The Court concluded:

> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege". By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.
>
> 408 U. S. at 482.

Thus, the Supreme Court explicitly rejected the characterization of the government benefit as a "right" or a "privilege".[5]

The Supreme Court next decided *Gagnon v. Scarpelli, supra,* 411 U. S. 778. Finding no "difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation * * *", 411 U. S. at 782, the Court held the standards of due process prescribed in Morrissey also applied to parole revocation proceedings.

Thereafter, in *Wolff v. McDonnell, supra,* 418 U. S. 539, the Supreme Court extended application of the due process clause to prison disciplinary proceedings which might result in the forfeiture of good-time credits. The Court emphasized that prisoners are not stripped of their constitutional rights by virtue of their imprisonment.

> There is no iron curtain drawn between the Constitution and the prisons of this country. * * * They (prisoners) may not be deprived of life, liberty, or property without due process of law. *Haines v. Kerner,* 404 U. S. 519 (1972); *Wilwording v. Swenson,* 404 U. S. 249 (1971); *Screws v. United States,* 325 U. S. 91 (1945).
>
> 418 U. S. at 555-56.

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5 The right-privilege distinction has also been rejected as a basis for constitutional analysis in several other areas. *Sugarman v. Dougall,* 413 U. S. 634 (1973); *Perry v. Sindermann,* 408 U. S. 593 (1972); *Board of Regents v. Roth,* 408 U. S. 564 (1972); *Graham v. Richardson,* 403 U. S. 365 (1971); *Bell v. Burson,* 402 U. S. 535 (1971); *Goldberg v. Kelly,* 397 U. S. 254 (1970). *See also Van Alstyne, Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. R. 1439 (1968).

The Court continued:

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria Workers v. McElroy,* 367 U. S. 886, 894 (1961). But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context.
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> * * *
>
> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia,* 129 U. S. 114, 123 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.
>
> 418 U. S. at 557-558.

Following this same rationale, the Court of Appeals for the District of Columbia held in *Childs v. United*

States Board of Paroles, supra, 511 F. 2d 1270, that due process is applicable to federal parole release procedures.

> The deprivations due to revocation of the conditional liberty enjoyed by a parolee demonstrate the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished by the government under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prison is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a "grievous loss" or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimal standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities.
>
> * * *
>
> Just as the (Supreme) Court found in *Wolff* that the State, having created the valuable right to good time, must act according to constitutional safeguards when it withdraws the right, so here, where the federal government has made parole an integral part of the penological system, I believe it is also essential that authority to deny parole not be arbitrarily exercised. While the applicant's status is not changed by such a denial in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of

> a Board determination which if favorable would have changed the status to one of greater liberty.
>
> 511 F. 2d at 1278, 1280.

There is no doubt a technical distinction between the situations in *Morrissey, Gagnon and Wolff* when compared to the situation in the instant case. In *Morrissey, Gagnon* and *Wolff,* a "liberty" (i. e., parole, probation and good-time credits) already afforded the individual was subject to termination or forfeiture. Here, however, the "liberty" has not yet been granted and is only prospective. The distinction, however, is not persuasive and, in any event, seems to this Court to be a subtle distinction without a real difference. This Court is in agreement with *Bradford v. Weinstein,* 519 F. 2d 728 (4th Cir. 1974), in holding that the present enjoyment of a protectable interest is not a prerequisite of due process.

> (The) present enjoyment of a protectable interest is not a prerequisite of due process. *See Goldsmith v. Board of Tax Appeals,* 270 U. S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926) (right of C. P. A. to practice before the Board of Tax Appeals); *Willner v. Committee on Character and Fitness,* 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), and *Schware v. Board of Bar Examiners,* 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (admission to the bar); *Speiser v. Randall,* 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (right to a tax exemption).
>
> 519 F. 2d at 732 n. 3.

Of course, the "nature of the interest at stake" in both parole release and parole revocation proceedings is the same: conditional liberty versus incarceration. *See Childs v. United States Board of Parole, supra,* 511 F. 2d at 1278. *See also Bradford v. Weinstein,* 519 F. 2d at 732;

United States ex rel. Johnson v. Chairman of New York State Board of Parole, supra, 500 F. 2d at 928.

It is the opinion of this Court that the inmate has more at stake in a parole release proceeding than in the institutional disciplinary hearing which was the situation in *Wolff.*

> (T)he prospective parolee stands to gain immediately conditional release, while being "acquitted" in a good-time forfeiture hearing means only that the inmate's tentative future release date will not be postponed.
>
> *Parole Release Decision Making and the Sentencing Process,* 84 Yale L. J. 810, 852 (1975).

The Court concludes that an inmate's right to parole is a valid aspect of "liberty" under contemporary standards of justice and that the denial of that "liberty" constitutes a grievous loss.[6] It follows that the critical parole decision must be guided by certain minimum requirements of procedural due process.

As in *Morrissey, supra,* 408 U. S. at 481, "the question remains what process is due."

> "'(D)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to

6 *Compare Meachum v. Fano,* 427 U. S. 215 (1976), wherein the court held that a state inmate was not entitled to a hearing when he was transferred to a prison with less favorable conditions, absent a state law or practice conditioning such transfer on proof of a serious misconduct or the occurrence of some other event. The court, citing *Wolff v. McDonnell, supra,* reaffirmed that a liberty interest may have its roots in state law and that due process requires minimum procedures to insure that the state created right is not arbitrarily abrogated, 427 U. S. at 226. In the instant case the right to consideration for parole is recognized in Neb. Rev. Stat. §§ 83-1,107 through 83-1,112 (Reissue 1976).

> time, place and circumstances." *Cafeteria Workers v. McElroy,* 367 U. S. 886, 895 (1961). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U. S. 471, 481 (1972). Accordingly, resolution of the issue * * * requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy,* 416 U. S. at 167-168 (Powell, J., concurring in part); *Goldberg v. Kelly,* 397 U. S. at 263-266; *Cafeteria Workers v. McElroy, supra,* at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e. g., Goldberg v. Kelly, supra,* at 263-271.
>
> *Matthews v. Eldridge,* 424 U. S. 319, 334-35 (1976).

Accordingly, the interests of the individual and the state must be carefully balanced to arrive at the requisite procedural protections. The inmate's interest in the Board's decision to grant or deny his parole is, of course, enormous. Simply put, the decision determines "whether (he) will be free or in prison, a matter of obvious great moment to him." *Wolff v. McDonnell, supra,* 418 U. S. at 560.[7] On the other hand it is equally clear that the Board has a very substantial interest in deciding whether and

7 In *Wolff,* however, the court noted that the deprivation of good-time credits did not involve an immediate change in the conditions of the inmate's liberty. 418 U. S. at 561.

when release on parole is appropriate. Yet, the Board has no interest in denying parole without certain minimum procedural safeguards to insure an informed evaluation and an accurate decision on the subject. An equally important governmental interest should be the fair and equal treatment of individuals so as to "enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey v. Brewer, supra,* 408 U. S. at 484.

This court rejects plaintiffs' argument that the full panoply of rights mandated in an adversary criminal proceeding should be afforded an inmate in a parole release proceeding. "(T)he full trappings of adversary trial-type hearings * * * would in all likelihood so burden and delay the entire parole release process as to disadvantage the very interests of the inmates as well as the public interests." *Beckworth v. New Jersey State Board of Parole,* 62 N. J. 348, 301 A. 2d 728 (1973).[8]

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8 The plaintiffs alternatively argue that the requisite procedural protection should be the same as recognized in parole revocation proceedings under *Morrissey*. These would include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation; (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.
>
> 408 U. S. at 489.

(Continued on next page)

In attempting to strike a balance between the competing interests involved, the court finds *Wolff v. McDonnell, supra,* 418 U. S. 539, most analagous to the instant case. Using the standards set out therein as a model, the Court adopts the following minimum requirements of procedural due process as applicable to the instant case:

1) Every inmate eligible for parole under Nebraska law must be afforded a formal parole hearing.

2) At least seventy-two hours prior to the scheduled time of the parole hearing, each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the Board. Accompanying the notice of hearing shall be a concise listing of the factors which the Board might in appropriate cases consider in evaluating any eligible inmate for discretionary parole. The notice required here will insure the eligible inmate a fair opportunity to prepare for his appearance and presentation before the Board, if he desires to do so.

3) Each inmate for whom a parole hearing is scheduled must be allowed to appear in person before the

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(Continued from previous page)

Within the present prison context, however, these requirements carry the potential for disrupting the efficient administration of the parole process and for interfering with institutional safety and correctional goals. *See Baxter v. Palmigiano,* 425 U. S. 308 (1976). In *Wolff,* the court specifically noted the special tension and dangers inherent in confrontational procedures within a prison. 418 U. S. at 561-63. The process rights must afford a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." 418 U. S. at 556.

Board to present evidence in support of his application, subject to prison security considerations. The scope of this right, and its rationale is well stated in *Wolff,* commencing at page 566.

> Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case. The operation of a correctional institution is at best an extraordinary difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impedi-

> ments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.
>
> Confrontation and cross-examination present greater hazards to institutional interests. If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These procedures are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations, *Pointer v. Texas,* 380 U. S. 400 (1965), or where a person may lose his job in society, *Greene v. McElroy,* 360 U. S. 474, 496-497 (1959). But they are not rights universally applicable to all hearings. See *Arnett v. Kennedy,* 416 U. S. 134 (1974). Rules of procedure may be shaped by consideration of the risks of error, *In re Winship,* 397 U. S. 358, 368 (1970) (Harlan, J. concurring); *Arnett v. Kennedy, supra,* p. 171 (White, J., concurring in part and dissenting in part), and should also be shaped by the consequences which will follow their adoption. Although some States do seem to allow cross-examination in disciplinary hearings, we are not apprised of the conditions under which the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.
>
> * * *
>
> The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would

also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.

Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. 418 U. S. at 566-68, 570.

(4) A record of the proceedings at the parole hearing must be maintained. As the court noted in *Wolff* at page 565:

> Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, * * * the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.

418 U. S. at 565. (Footnote omitted.)

(5) Within a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole. This requirement was specifically approved in *Wolff,* 418 U. S. at 564. By stating its reasons for denying parole, the Board will promote several important functions:

> First, stating reasons for the denial of parole might help to rehabilitate the prisoner through education and guidance through self-improvement. Second, the reasons might help relieve the frustration resulting from a lack of knowledge of how one is being measured for release. Third, a policy of openness and honesty would be promoted, thereby exposing arbitrariness within the decision-making process, and allowing for the development of a body of acceptable decision-making formula.
>
> Comment 6 St. Mary's Law Journal, 478, 487 (1974).

See also United States ex rel. Johnson v. Chairman of New York Board of Parole, supra, 500 F. 2d at 931-933; *Childs v. United States Board of Parole, supra,* 511 F. 2d at 1282-83.

> A requirement that the Board state its reasons in each case for denial of parole would also serve purposes other than facilitating judicial review, which are peculiarly appropriate for parole release determinations. A reasons requirement "promotes thought by the decider," and compels him "to cover the relevant points" and "eschew irrelevancies." See Frankel, Criminal Sentences 40-41 (1973).

* * *

Besides safeguarding against purely arbitrary denials of parole, a reasons requirement can serve the important function of promoting rehabilitation by relieving inmates' frustrations and letting them know how they might, by improving their prison behavior or taking steps with respect to some other factor in doubt (e. g., prospective employment or housing), better their chances for release. 500 F. 2d at 931-32.

In *King,* decided under the "reasons" requirement of the Administrative Procedure Act, the court referred with approval to the recommendations of the Administrative Conference of the United States (25 Ad. L. Rev. 459, 484-85 (Fall, 1973)). The court quoted a report used by the Conference in preparing its recommendations:

"Giving reasons for denying parole is desirable for both rehabilitational and legal reasons. A prisoner may feel less resentful of a negative decision if he knows the reasons for it, and in planning his activities in the institution he ought to understand clearly what will help him to obtain an early parole. When the nature of his crime is such that early parole is not likely in any event, he should be protected from unrealistic hopes that can only lead to disappointment and bitterness. All this is the job of a prison counselor in any case, but the Parole Board can make that job much easier by formally stating its reasons." 492 F. 2d at 1340 n. 11. The court expressed awareness of the pitfalls enumerated by the Conference to be avoided in the giving of reasons, *Id.* at 1341 n. 12, but did not consider that they overcame the need for a statement of reasons, nor had the Conference itself done so.

Childs v. United States Board of Parole, 511 F. 2d 1270, 1282 (1974).

It is this court's judgment that the above procedures represent a reasonable and proper accommodation between

the interests of prospective parolees and the interests of the state and which will not unduly burden the Board's task.

We turn to the question of whether the safeguards currently afforded under Nebraska law are adequate. The Nebraska statutory scheme provides for a two-step hearing process in discretionary parole proceedings.[9] The first step is a "case and record review hearing." These hearings are conducted at least annually by the Board for all inmates, regardless of their eligibility for parole. *See* Neb. Rev. Stat. § 83-192(9) (Reissue 1976).[10]

In practice, the review hearing consists of a five-to-ten minute appearance of each inmate before the Board.

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9 Discretionary parole, as defined by the Board, is a release on parole by virtue of an exercise of discretion on the part of the Board, such release occurring prior to expiration of the maximum term of imprisonment imposed by the sentencing court. An inmate becomes eligible for release on discretionary parole upon completion of his minimum term of confinement less any deduction for good behavior. In the case of an inmate serving consecutive sentences, he becomes eligible for parole upon completion of the total of the minimum term, less any reduction for good behavior. See Neb. Rev. Stat. § 83-1,110 (Reissue 1976).

10 Neb. Rev. Stat. § 83-192(9) (Reissue 1976) reads:

The Board of Parole shall:

* * *

(9) Review the record of every committed offender, whether or not eligible for parole, not less than once each year. Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record, his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and his prospects for future parole.

The inmates do not have the right to present documentary evidence or to call witnesses in their own behalf. Following the review hearing, an inmate is either deferred for later consideration, or if eligible for a discretionary parole[11] and if approved by the Board, he is scheduled for a parole hearing.

In the case of a deferral, the inmate receives a Form PB-1 informing the inmate of the reasons for denial and making recommendations for correcting deficiencies. The form further specifies the month, but not the date or time, of the next review hearing.

If, on the other hand, after the review hearing, the Board schedules the inmate for a formal parole hearing, the second stage of the hearing process, the inmate receives a Form PB-2, notifying him that he is eligible for parole and identifying the month when a hearing will be held. Notification of the exact date and time of the hearing is posted at the Penal Complex on the date of the hearing. Subsequently, inmates denied parole are notified by letter as required by Section 83-1,111(2). The letter usually, but not always, contains the reasons for denial. In no case is the inmate advised of the evidence relied on by the Board in reaching its decision.[12]

It would serve no purpose to delineate further the practices of the Board with regard to the scheduling and conducting of the hearings for inmates eligible for pa-

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11 *See* Note 9, *supra*.

12 Neb. Rev. Stat. § 83-1,111(1) (Reissue 1976) requires that a complete record of the proceedings at a parole hearing be maintained, but does not specify that the Board identify the evidence upon which it relies in reaching a decision.

role.[13] Suffice it to say that in respect to the procedures which this court holds are required as a minimum, the present practice of the Board falls short in some instances, and is broader than what this Court requires in other instances.

Having determined that not all constitutionally mandated safeguards are currently provided by defendants, the remaining issue is what forms of relief are appropriate. Plaintiffs are entitled to injunctive relief and to that end a judgment will be entered this day requiring the defendants to implement and put into effect the procedures required by this determination within sixty days from this date. This is not to suggest that the Board in its discretion may not continue practices beyond those mandated herein but only to require that at a minimum those provisions be implemented.

Plaintiffs' request for monetary damages is denied. Plaintiffs have not adequately proved that they have sustained actual damages as a result of the activities of the defendants. The evidence indicates that the defendants have acted in good faith to discharge their responsibilities as fairly and equitably as possible. In view of the novelty of the issues presented in this jurisdiction and the split in other circuits on the question involved here, the evidence does not warrant a finding which justifies a mone-

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13 In view of the determination regarding the minimum safeguards necessary for parole hearings, we do not pass on the validity of certain practices mandated by Nebraska statutes or policies such as furnishing information or records to an inmate and his right to confer with others in preparation of his presentation before the Board (Neb. Rev. Stat. § 83-1,112).

tary award in this case. *See Pierson v. Ray,* 386 U. S. 547 (1967); *Scheuer v. Rhodes,* 416 U. S. 232 (1974); *Wood v. Strickland,* 420 U. S. 308 (1975).

Under the provisions of 42 U. S. C. § 1988 the court finds that plaintiffs should be allowed a reasonable attorney fee as a part of the costs to be borne by the defendants. The court will leave to the parties the task of determining an appropriate fee for the appointed counsel for plaintiffs with the admonition that should the parties be unable to agree on an amount, they may apply to this court for determination of the fee. The taxing of costs, including attorney fees, whether agreed upon or not, shall not operate to preclude any party from immediately exercising its appeal rights should it desire to do so.

Consistent with this memorandum, a separate order will be entered this day.

BY THE COURT:

/s/ Albert G. Schatz
Judge, United States District Court

APPENDIX C

83-192. The Board of Parole shall:

(1) Determine the time of release on parole of committed offenders eligible for such release;

(2) Fix the conditions of parole, revoke parole, issue or authorize the issuance of warrants for the arrest of parole violators, and impose other sanctions short of revocation for violation of conditions of parole;

(3) Determine the time of discharge from parole;

(4) Visit and inspect any facility, state or local, for the detention of persons charged with or convicted of an offense, and for the safe-keeping of such other persons as may be remanded thereto in accordance with law;

(5) Serve in an advisory capacity to the Director of Correctional Services in administering parole services within any facility and in the community;

(6) Interpret the parole program to the public with a view toward developing a broad base of public support;

(7) Conduct research for the purpose of evaluating and improving the effectiveness of the parole system;

(8) Recommend parole legislation to the Governor;

(9) Review the record of every committed offender, whether or not eligible for parole, not less than once each year. Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record,

his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and his prospects for future parole;

(10) Make rules and regulations for its own administration and operation;

(11) Appoint and remove all employees of the board and delegate appropriate powers and duties to them;

(12) Transmit annually to the Governor a report of its work for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

(13) Exercise all powers and perform all duties necessary and proper in carrying out its responsibilities under the provisions of this act.

83-1,111. (1) Every committed offender shall have a hearing before a majority of the members of the Board of Parole within sixty days before the expiration of his minimum term less any reductions. Every committed offender shall be interviewed within sixty days prior to his final parole hearing by a member of the Board of Parole. The hearing shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

(2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing. The decision shall be by majority vote of the board. The decision shall be based on the entire record before the board, which shall

include the opinion of the member who presided at the hearing. If the board shall deny parole, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

(3) If the board fixes the release date, such date shall be not more than six months from the date of the committed offender's parole hearing, or from the date of last reconsideration of his case, unless there are special reasons for fixing a later release date.

(4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

(5) The release of a committed offender on parole shall not be upon the application of the offender, but by the initiative of the Board of Parole. No application for release on parole made by a committed offender or on his behalf shall be entertained by the board. Nothing herein shall prohibit the Director of Correctional Services from recommending to the board that it consider an individual offender for release on parole.

83-1,112. (1) Each committed offender eligible for parole shall, in advance of his parole hearing, have a parole plan in accordance with the rules of the Board of Parole. Whenever the board determines that it will facilitate the parole hearing, it may furnish the offender with any information and records to be considered by it at the hearing.

(2) An offender shall be permitted to advise with any person whose assistance he desires, including his own legal counsel, in preparing for a hearing before the Board of Parole.

83-1,114. (1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment.

(g) The type of residence, neighborhood or community in which the offender plans to live;

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup, including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

83-1,115. Before making a determination regarding a committed offender's release on parole, the Board of Parole shall consider the following:

(1) A report prepared by the institutional caseworkers relating to his personality, social history and adjustment to authority, and including any recommendations which the staff of the facility may make;

(2) All official reports of his prior criminal record, including reports and records of earlier probation and parole experiences;

(3) The presentence investigation report;

(4) Recommendations regarding his parole made at the time of sentencing by the sentencing judge;

(5) The reports of any physical, mental and psychiatric examinations of the offender;

(6) Any relevant information which may be submitted by the offender, his attorney, the victim of his crime, or by other persons; and

(7) Such other relevant information concerning the offender as may be reasonably available.

APPENDIX

In The

Supreme Court of the United States

October Term, 1977

—o—

No. 78-201

—o—

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM, and CHARLES LaPLANTE,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 4, 1978

CERTIORARI GRANTED OCTOBER 2, 1978

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

Date	No.	
1972		
Nov. 13	1	Complaint.
1973		
Nov. 29	64	Memorandum and Order (AGS) that Action shall continue as a Class Action with Robert McDonnell representing that Class, etc.; that Defendants' Motion to Strike allegations regarding removal of John Greenholtz as a member of the Board is granted etc. Copy mailed to Counsel of Record.
1976		
Aug. 11	170	Plaintiffs' Amended Complaint.
Aug. 11	171	Motion to Designate New Representative Parties For Class of Persons alleging Denial of Due Process by Richard Walker, William Randolph and Richard Leary and Robert L. Gamron.
Aug. 30	180	Defendants' Answer to Amended Complaint.
1977		
Feb. 16	196	Order (AGS) that Motion (filing No. 171) is Granted—that case is set for trial at a date after 4-15-77. Copies mailed to Counsel of Record.
May 31	200	Courtroom Minutes—trial before Judge Schatz—Case submitted.
June 17	205	Motion to Designate New Representative Parties for Class of Persons alleging Denial of Due Process.
June 17	208	Order (AGS) designating additional Class Representatives. Copies mailed to Counsel of Record.
Oct. 21	210	Memorandum Opinion.

Oct. 21 211 Order (AGS) that Defendants will implement and put into effect within 60 days from this date procedures that will safeguard the due process rights of the plaintiff class, etc.
Copies mailed to Counsel of Record.

Nov. 7 212 Defendants' Notice of Appeal to United States Court of Appeals.
Copy mailed to Brian K. Ridenour, Counsel, and to Jack Fitch, Court Reporter, 8015 U. S. Courthouse, 215 North 17th Street, Omaha, Nebraska 68101.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1889

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM and CHARLES LaPLANTE,

Appellees,

vs.

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: February 14, 1978

Filed: May 18, 1978

Before HEANEY and STEPHENSON, Circuit Judges, and BECKER,* District Judge.

STEPHENSON, Circuit Judge.

The defendants-appellants, members of the state of Nebraska Board of Parole (Board), appeal from the decision of the district court[1] in this class action suit arising under 42 U. S. C. § 1983. The district court held that the plaintiffs-appellees, inmates of the Nebraska Penal Complex (inmates), had been denied procedural due process by the Board in the Board's consideration of the inmates for suitability for parole.

This case raises the question of whether the due process clause of the Fourteenth Amendment to the United States Constitution extends to parole release determinations, and if so, whether the safeguards currently available under applicable Nebraska law are constitutionally adequate. We affirm that the due process clause applies to parole release proceedings. With respect to the specific procedural safeguards which the district court found were constitutionally required in such proceedings, we affirm in part, reverse in part, and remand.

The Nebraska Board of Parole consists of five members. The chairman and two members are full-time, and the other two members serve on a part-time basis. Neb. Rev. Stat. § 83-191. Under Nebraska law the Board is

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*The Honorable William H. Becker, Senior United States District Judge for the Western District of Missouri, sitting by designation.

1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

charged with the responsibility of determining whether and when an inmate should be released on discretionary parole. Neb. Rev. Stat. §§ 83-192, 83-1,114, 83-1,115. The Board is required by statute to review at least once a year the record of each convicted offender, whether or not eligible for parole, and to meet with him and counsel him concerning his progress and prospects for a future parole. Neb. Rev. Stat. § 83-192 (9). These parole review hearings last an average of five to ten minutes and the inmates are not allowed to present evidence or call witnesses in their behalf.

After the annual parole review hearing, each prisoner is sent a form which informs him whether or not he is to receive a formal parole hearing. If he does not receive a formal parole hearing the reasons for deferral at that time are stated and recommendations are made for correcting the deficiencies. Only those inmates who are eligible for discretionary parole are granted a formal parole hearing, but in some instances eligible inmates did not receive a timely formal parole hearing. Between July 1, 1975, and June 30, 1976, 327 formal parole hearings and 1,645 review hearings were held.

If the inmate is given a formal parole hearing, he is permitted to offer evidence in support of parole, and may be represented by retained counsel. He is not permitted to cross-examine or hear opposition witnesses. If he is denied parole after a formal parole hearing, he is so advised in person and by letter. Generally the letter advises him of the reasons for denial, although eight instances were found between January 1975 and November 1976 in which reasons were not contained in the letter.

Inmates are notified either at the time of their original confinement or at subsequent parole review hearings or formal parole hearings of the month during which their next hearing will be held. This general notification occurs from 30 days to 1 year in advance. Notification of the precise date and hour occurs through posting of such information at the penal complex on the date of the hearing.

In its order and memorandum opinion of October 21, 1977, the district court concluded that parole release proceedings must be conducted in accordance with certain due process requirements and that the Board's procedures failed to comply fully with those required procedures. The court further found that the inmates were not entitled to monetary damages, but did allow them to recover their costs, including reasonable attorney fees under 42 U. S. C. § 1988.

The initial issue confronting this court is whether parole determination proceedings implicate a liberty interest of the inmates within the meaning of the due process clause of the Fourteenth Amendment. We are convinced that it does.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Our inquiry of whether the prohibitions of the Fourteenth Amendment apply begins with the Supreme Court case of *Morrissey v. Brewer*, 408 U. S. 471 (1972), where the Court held that the due process clause was applicable to proceedings resulting in revocation of parole. In *Morrissey,* the Court articulated the proper framework for analysis of the question of whether due process applies in a particular situation.

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U. S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U. S. 67 (1972).

Morrissey v. Brewer, supra, 408 U. S. at 481.

The interest asserted by the inmates in this suit is the present right to be considered for parole in accordance with certain procedural safeguards.[2] Since the state is not required by the Constitution to provide parole for convicted offenders, the inmates' interest is aptly described as a privilege or a matter of grace. However, this distinction is no longer an acceptable basis for determining where the due process clause applies to a governmental action. Chief Justice Burger, speaking for a majority of the Court in *Morrissey v. Brewer, supra*, 408 U. S. at 481, stated: "As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."' *Graham v. Richardson*, 403 U. S. 365, 374 (1971)."

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2 Since it is the manner of parole decision-making, not its outcome, that is challenged, the inmates did not present a complaint of the sort in *Preiser v. Rodriguez*, 411 U. S. 475 (1973), for which the inmates' sole federal remedy is a writ of habeas corpus. *See Wolff v. McDonnell*, 418 U. S. 539, 553-55 (1974); *Bradford v. Weinstein*, 519 F. 2d 728, 733-34 (4th Cir. 1974), *vacated as moot*, 423 U. S. 147 (1975).

In the present case the Board attempts to distinguish *Morrissey* as well as *Wolff v. McDonnell*, 418 U. S. 539 (1974) (due process applies to prison disciplinary proceedings where good time credit may be lost), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973) (due process applies to probation revocation proceeding), on the basis that those cases involved the loss of a privilege and here we are concerned with a denial of a privilege. That is a distinction without a real difference. *Bradford v. Weinstein*, 519 F. 2d 728, 732 and n. 3 (4th Cir. 1974), *vacated as moot*, 423 U. S. 147 (1975).

> [The] present enjoyment of a protectable interest is not a prerequisite of due process. See Goldsmith v. Bd. of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926) (right of C. P. A. to practice before the Board of Tax Appeals); Willner v. Committee on Character and Fitness, 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), and Schware v. Board of Bar Examiners, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (admission to the bar); Speiser v. Randall, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (right to a tax exemption).

Bradford v. Weinstein, supra, 519 F. 2d at 732 n. 3. *But see Brown v. Lundgren*, 528 F. 2d 1050, 1052-53 (5th Cir.), *cert. denied*, 429 U. S. 825 (1976). While the parole applicant's status is not changed by denial of his application, "in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of a Board determination which if favorable would have changed the status to one of greater liberty." *Childs v. United States Board of Parole*, 511 F. 2d 1270, 1280 (D. C. Cir. 1974). The nature of the in-

terest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration —and thus the Fourteenth Amendment applies to both.

The Board also claims that parole release determinations should be treated differently than the determinations involved in *Morrissey, Gagnon,* and *Wolff* because in these latter cases the respective boards were required to make factual determinations and therefore hearings were appropriate. However, Neb. Rev. Stat. § 83-1,114 provides that a prisoner eligible for parole is to be released on parole unless he is found to be unfit for one of the reasons listed in the statute. Thus, the Board's decision of whether to grant parole necessitates a factual determination of whether the statutory criteria are present.

The deprivations which result from revocation of a conditional liberty enjoyed by a parolee described in *Morrissey v. Brewer, supra,* 408 U. S. at 481-82, demonstrate the serious effects of denial of parole. Although a parolee is subject to many restrictions not applicable to other citizens, he is able to do a wide range of things available to persons who have never been convicted of a crime. "Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer, supra,* 408 U. S. at 482.

Since the protection of the due process clause extends to parolees, it may not be denied to inmates. While lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, an iron curtain is not drawn between the prisons of this country and the

Constitution. *Wolff v. McDonnell, supra,* 418 U. S. at 555-56. Prisoners may not be deprived of life, liberty, or property without due process of law. *Id.* at 556.

The inmates are not the only ones with an interest in seeing that the parole determination proceedings are conducted in accordance with the due process clause. The Supreme Court recognized in *Morrissey v. Brewer, supra,* 408 U. S. at 484, that society has a stake in the effort to restore the prisoner to a normal and useful life within the law. Thus, society has an interest in not having release on parole denied because of an erroneous determination. Society has a further interest in treating the prisoner with basic fairness. Fair treatment in parole determinations "will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.*

Of the six circuit courts of appeals which have decided the issue, four have held that the Fourteenth Amendment does apply to parole determination proceedings. *Franklin v. Shields,* 569 F. 2d 784, 800 (4th Cir. 1978) (en banc); *United States ex rel. Richerson v. Wolff,* 525 F. 2d 797 (7th Cir. 1975), *cert. denied,* 425 U. S. 914 (1976); *Childs v. United States Board of Parole, supra; United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole,* 500 F. 2d 925 (2d Cir.), *vacated as moot,* 419 U. S. 1015 (1974). *Contra, Scott v. Kentucky Parole Bd.,* No. 74-1899 (6th Cir. Jan. 15, 1975), *vacated and remanded to consider mootness,* 429 U. S. 60 (1976), *on remand sub nom. Bell v. Kentucky Parole Bd.,* 556 F. 2d 805 (1977); *Scarpa v. United States Bd. of Parole,* 477 F. 2d 278 (5th Cir.) (en banc), *vacated and remanded to consider mootness,* 414 U. S. 809, *dismissed as moot,* 501 F. 2d 992 (5th Cir. 1973).

The Supreme Court has not decided the exact question before us of whether a prisoner's interest in prospective parole is an interest to be afforded protection under the due process clause of the Fourteenth Amendment. It must be acknowledged that there are indications both ways in recent Supreme Court opinions. *See discussion, Williams v. Ward,* 556 F. 2d 1143, 1157-58 (2d Cir. 1977), *cert. dismissed,* — U. S. —.

The Board primarily relies on the companion cases of *Meachum v. Fano,* 427 U. S. 215 (1976), and *Montanye v. Haymes,* 427 U. S. 236 (1976), for its contention that parole determinations do not implicate the Fourteenth Amendment. In *Meachum,* the Supreme Court held that the due process clause did not entitle a prisoner to a hearing when he is transferred from one prison to another, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.

We are not persuaded that the holdings of those cases are applicable to the present case. First, *Meachum* involved a transfer only from one prison to another, albeit with less favorable conditions, while here the Board's determination results in either conditional liberty or incarceration. Second, the holding of *Meachum* expressly excludes situations where a right was created by state law. The inmates' interest in this case is the right to be considered for parole, a right created by Nebraska law.

In *Wolff v. McDonnell, supra,* 418 U. S. at 558, the Court held that a person's liberty interests may be protected by the Fourteenth Amendment even when the liberty itself is a statutory creation of the state. The Court

found that where the state had created a statutory right for a prisoner to have his sentence shortened for good conduct, and also specified that it was to be forfeited only upon serious misbehavior, the prisoner's interest was within the liberty protected by the Fourteenth Amendment. Therefore, we must examine the Nebraska statutes governing parole release determinations to ascertain if they create a liberty interest.

Under Nebraska law, every committed offender is eligible for parole upon completion of his minimum term less reductions granted for good conduct. *See* Neb. Rev. Stat. §§ 83-1,105, 83-1,110. The Board of Parole has the duty to determine the time of release on parole of committed offenders eligible for such release and to fix the conditions of parole. Neb. Rev. Stat. § 83-192. The Board is further authorized to issue subpoenas, compel the attendance of witnesses, and the production of documents, and to administer oaths and take testimony. Neb. Rev. Stat. § 83-195.

Every committed offender is entitled to a hearing within 60 days before he is eligible for parole and when parole is not granted the Board is required to provide written notification of the reasons for denial. Neb. Rev. Stat. § 83-1,111. Section 83-1,111 further provides that if parole is denied the committed offender shall receive at least once a year a hearing at which his application is reconsidered. Neb. Rev. Stat. § 83-1,115 lists the items which are to be considered by the Board in making its determination of whether to release a prisoner on parole.

Finally, the Board is directed by Neb. Rev. Stat. § 83-1,114[3] to release an eligible prisoner on parole unless it

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3 Neb. Rev. Stat. § 83-1,114 provides in full:

Board of Parole; deferment of parole; grounds.

(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(Continued on next page)

finds that release should be deferred due to one of the reasons specified in the statute. Section 83-1,114 also lists the factors to be considered by the Board in making this determination.

An examination of Nebraska law reveals that the inmates have a right to be considered for parole, and this right is protected by procedural safeguards created by statute. In *Wolff*, where the state created the statutory right of shortened sentences for good behavior, the Supreme Court held such good behavior credits were to be withdrawn only when certain constitutional safeguards were adhered to. It follows that since Nebraska has made

(Continued from previous page)

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup, including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

parole an integral part of its penological system and provided that those eligible for parole are to be released on parole unless one of the reasons for denial specified in the statute is found to be present, the authority to deny parole must not be exercised arbitrarily. Neb. Rev. Stat. § 83-1,114 provides the inmates with a justifiable expectation rooted in state law that they will be conditionally released if they meet the statutory standards. Consequently, the Fourteenth Amendment due process clause is implicated. *See Wolff v. McDonnell, supra,* 418 U. S. at 557. *Compare Meachum v. Fano, supra,* 427 U. S. at 228; *Montanye v. Haymes, supra,* 427 U. S. at 242.

We agree with the reasoning of the original panel opinion in *Franklin v. Shields,* 569 F. 2d 784, 789-90 (4th Cir. 1977), *rev'd en banc,* 569 F. 2d 800 (4th Cir. 1978) (reversed upon the grounds that "the only explicit constitutional requisite is that the Board furnish to the prisoner a statement of its reasons for denial of parole"), where it was stated that:

> Since the [state] statutes contemplate that a prisoner who has satisfied all the requirements for parole will be conditionally released, the Board's investigation and review are crucial. A prisoner has much at stake in properly conducted parole proceedings, for they may result in his conditional freedom. If the proceedings are flawed—even unintentionally and in good faith, through reliance on incomplete or incorrect information—they may add years to a prisoner's confinement. Consequently, the accuracy and the sufficiency of the information the Board obtains in its investigation, which the statutes require, can have a decisive effect on parole. Also, whether the Board's review is full and fair, as contemplated by the statutes, may be a determinative factor in the grant

> or denial of parole. Therefore, we hold that the statutes governing the manner in which a prisoner shall be considered for parole confer on the prisoner an interest in liberty. [Footnote omitted.]

In summary, we find that a prisoner in Nebraska has a statutory right to fair parole consideration. Because this right involves the prisoner's liberty interest, the inmate's right to consideration for parole is an aspect of liberty to which the protection of the due process clause extends. Therefore, the minimum requirement of procedural due process appropriate for the circumstances must be observed.

Having concluded that the due pocess clause is applicable to parole release proceedings, the question remains how much process is due. In this inquiry we are guided by the Supreme Court's observations in *Morrissey v. Brewer, supra.*

> It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U. S. 886, 895 (1961).

Morrissey v. Brewer, supra, 408 U. S. at 481. This balancing test was further refined in *Mathews v. Eldridge,* 424 U. S. 319, 334-35 (1976). The Court stated that:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected

> by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The inmates' interest is the avoidance of arbitrary denial of parole when all of the requirements for release are satisfied. This is indeed a grievous loss. Although the severity of the loss is not a factor in determining whether governmental action implicates the Fourteenth Amendment, it is a factor when considering the extent to which procedural safeguards are required. *Meachum v. Fano, supra,* 427 U. S. at 224; *Goss v. Lopez,* 419 U. S. 565, 575-76 (1975); *Board of Regents v. Roth,* 408 U. S. 564 (1972); *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra,* 500 F. 2d at 928.

On the other hand the Board has a substantial interest in releasing a prisoner on parole at the appropriate time. Society suffers both when the prisoner is released before he is fully rehabilitated and when he is kept in prison beyond the time when all purposes of incarceration have been served. Thus, the Board has an interest in seeing that parole is neither granted nor denied on the basis of inaccurate information or an erroneous evaluation. The Board has additional interests. It must be concerned that the procedures adopted do not interfere with the security of the institution or undermine discipline of the prisoners. It must also be concerned about the increased administrative burdens and costs occasioned by the procedural safeguards.

The task facing this court is to ascertain the minimal requirements of fundamental fairness by balancing the interests of the inmates in their statutorily granted expectation of meaningful consideration for parole and the interests of the state and society in the orderly administration of the parole system.

We agree with the district court that a parole decision is not a part of a criminal prosecution and the full panoply of rights due a defendant in such proceedings does not apply. *See, e. g., Franklin v. Shields,* 569 F. 2d 784, 800 (4th Cir. 1978) (en banc); *Haymes v. Regan,* 525 F. 2d 540 (2d Cir. 1975). *See also Wolff v. McDonnell, supra,* 418 U. S. at 556; *Morrissey v. Brewer, supra,* 408 U. S. at 482 n. 8. However, as to the precise procedural safeguards required by the due process clause, we agree completely with neither of the parties nor the district court We find that the procedures currently employed by the Board are in certain respects constitutionally deficient but the procedures required by *Wolff v. McDonnell, supra,* need not be followed in all respects in parole decisions in state prisons. With the interests of the inmates and state in mind, we will now consider each of the procedural protections required by the district court.[4]

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4 We note that the procedural protections required by this opinion are applicable only to inmates who are eligibile for parole. We do not discourage Nebraska from conducting annual record reviews for all prisoners, see Neb. Rev. Stat. § 83-192 (9), but this case only concerns those prisoners that are eligible for parole.

In its decision of October 21, 1977, the district court ordered that "[e]very inmate eligible for parole under Nebraska law must be afforded a formal parole hearing." At a minimum, once it is determined that an interest is protected by the due process clause, a hearing for the person affected is required. *See Wolff v. McDonnell, supra,* 418 U. S. at 557-58; *Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, 313 (1950). The inmates contend that the district court required that all inmates eligible for parole be given a formal parole hearing annually. Although the district court's opinion is arguably ambiguous on this point, we understand it to only require a formal parole hearing upon an inmate's first becoming eligible for parole. In any event, we hold that to comply with the due process clause the Board has to provide a formal parole hearing only when the inmate first becomes eligible for parole. Subsequent formal parole hearings need be held only in the discretion of the Board. We, of course, do not discourage the Board from offering more frequent formal parole hearings.

The second minimum requirement imposed by the district court concerns the notice to be given to the inmates. It provides that:

> At least seventy-two hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole.

This standard actually contains two separate requirements. Initially, we have no hesitation in deciding that the due process clause entitles the inmate to receive reasonable

written notice of the date and hour for the hearing. *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U. S. at 313. Under normal circumstances we believe that a minimum advance notice of 72 hours, as mandated by the district court, allows the prisoner a fair opportunity to prepare for his appearance before the Board. Thus, the current practice followed by the Board of posting notice of the hearing at the institution on the day of the hearing is constitutionally infirm.

We also agree with the district court that the notice of the hearing must be accompanied by a listing of the criteria governing the Board's parole decisions. It is only fair to apprise the inmates of the standards to which they must conform if they are to be released on parole. Moreover, the Board offers no justification for not providing this information to the inmates. *See Franklin v. Shields, supra,* 569 F. 2d at 791-93; *Childs v. United States Board of Parole,* 371 F. Supp. 1246, 1247-48 (D. D. C.), *aff'd,* 511 F. 2d 1270 (D. C. Cir. 1974) (no appeal taken on this point); *Cooley v. Sigler,* 381 F. Supp. 441, 444 (D. Minn. 1974). *Contra, Haymes v. Regan,* 525 F. 2d 540 (2d Cir. 1975). Neb. Rev. Stat. § 83-1,114[5] lists the four reasons for which parole may be denied to an eligible prisoner. This section also provides 14 factors to be considered by the Board in making its decision of whether parole should be granted. We find that the statutory criteria are sufficiently specific to enable the inmate to prepare his presentation to the Board. *See Franklin v. Shields, supra,* 569 F. 2d at 791-92. We reiterate that a

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5 See note 3, *supra.*

list of the factors considered by the Board must accompany the notice of a hearing given to the prisoner, or preferably by posting the statutory criteria and guidelines in the institutions in a place or places where the inmates will have access to them.

The district court also found that to comply with the due process clause "[e]ach inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations." In its memorandum opinion the district court held, in reliance on *Wolff v. McDonnell, supra,* that this standard included the right to call witnesses subject to prison security considerations and the need to keep the hearing within limits. We affirm only in part. Subject to prison security considerations an inmate must be allowed to appear in person before the Board and to present documentary evidence in support of his application for parole. *Wolff v. McDonnell, supra*; *Mullane v. Central Hanover Bank & Trust Co., supra.* This means that in many cases it will be desirable for the Board to give the applicant sufficient notice to secure documentary evidence directed to the Board's function of predicting whether parole will be successful.

Under Nebraska law a prisoner has a right to be considered for parole on the basis of certain statutory specifications. To make this right effective a prisoner must be given the opportunity to personally appear before the Board to explain and amplify the information on which the Board will base its decision. The administrative inconvenience and cost of a personal hearing is not sufficient to deprive the prisoner of this right. Moreover, a personal hearing is also beneficial to the Board and society insofar as the reliability of parole decision-making is enhanced by personal hearings. However, in the absence of exceptional circumstances the prisoner does not have a constitutional right to call witnesses in his behalf in a formal parole hearing. Nevertheless, the Board in its discretion may permit the prisoner to call witnesses. In fact the record shows that currently the Board does allow a prisoner afforded a formal parole hearing to have witnesses. It follows from our holding that a prisoner does not have a constitutional right to confront and cross-examine adverse witnesses. *See Wolff v. McDonnell, supra,* 418 U. S. at 566-69.

The order of the district court decreed that "[a] record of the proceedings at the parole hearing must be maintained." It appears from the district court's reliance on *Wolff v. McDonnell, supra,* 418 U. S. at 565, in its memorandum opinion that this standard requires that a written record of the proceedings be maintained. Currently a record of the hearings is maintained by the Board in the form of tape recordings. We find that this method is constitutionally adequate provided that the recordings are of sufficient quality to enable the record to be reduced to writing.

The final requirement ordered by the district court is that "[w]ithin a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole." We affirm. Every circuit which has held that the due process clause is applicable to parole release determina-

tions has found that the parole board must inform the prisoner in writing of the reasons for denial of his application for parole. *See Franklin v. Shields, supra; United States ex rel. Richerson v. Wolff, supra; Childs v. United States Board of Parole, supra; United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, supra. See also Wolff v. McDonnell, supra,* 418 U.S. at 564-65.

We agree with the reasoning of the Second Circuit that for a statement of reasons to satisfy minimal due process requirements "detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision • • • and the essential facts upon which the Board's inferences are based • • •." *United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, supra,* 500 F. 2d at 934. *See United States ex rel. Richerson v. Wolff, supra*; *Cooley v. Sigler, supra,* 381 F. Supp. at 443; *Candirini v. Attorney General,* 369 F. Supp. 1132, 1137 n. 8 (E. D. N. Y. 1974). *Cf. Franklin v. Shields, supra,* 569 F. 2d at 797-98 n. 59, 801. The present practice of the Board is deficient in that an inmate is not informed as to the essential facts relied on by the Board in reaching its decision.

Providing a prisoner with the reasons for denial and the essential facts relied on will serve at least four purposes. Firstly, it will facilitate judicial review in those situations where it is allowed. Secondly, it will promote thought by the Board members and will compel them to cover the relevant points and eschew irrelevancies. Thirdly, it will promote the goal of rehabilitation by relieving the inmates' frustration by instructing them how

they might by improving their prison behavior or taking steps with respect to some other factor (e. g., prospective employment or housing), better their chances for release. In some situations a prisoner is not considered fit for parole because of a factor such as a long history of recidivism which the prisoner will not be able to remedy even if the Board states its reasons in writing. Nevertheless, a statement of reasons is important in those situations because it will show that the Board has not acted arbitrarily. Finally, by requiring the Board to state its reasons for denial a body of rules, principles and precedent which will promote consistency by the Board will be established. *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra,* 500 F. 2d at 929, 931-33; *Cooley v. Singler, supra,* 381 F. Supp. at 443. *See also Childs v. United States Board of Parole, supra,* 511 F. 2d at 1281-84; *Mower v. Britton,* 504 F. 2d 396, 398-99 (10th Cir. 1974); *King v. United States,* 492 F. 2d 1337, 1340-42 and n. 11 (7th Cir. 1974).

In summary, considering the Nebraska statutes governing parole and after weighing the interests of both the state and the prisoners, we conclude that as a minimum the due process clause of the Fourteenth Amendment requires the following: (1) Every inmate is to receive a formal parole hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the Board. (2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the Board in making its determination. (3) Subject to security considerations,

every inmate is allowed to appear in person before the Board and present documentary evidence in support of his application. In the absence of unusual circumstances an inmate does not have a constitutional right to call witnesses in his behalf. (4) A record of the proceedings which is capable of being reduced to writing must be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

The district court by its order of January 4, 1978, allowed an award of attorney fees of $3,000, plus expenses of $212.77, to be included as part of the taxation of costs against the Board under the provisions of 42 U. S. C. § 1988. We follow the ruling of this court in *Finney v. Hutto,* 548 F. 2d 740, 742 (8th Cir.), *cert. granted,* 98 S. Ct. 295 (1977) (No. 76-1660), that the Eleventh Amendment does not prohibit an award of attorney fees under section 1988 against a state agency although it is not a named party to the lawsuit. The district court did not abuse its discretion in awarding fees to the inmates in this case. *See Wharton v. Knefel,* 562 F. 2d 550 (8th Cir. 1977). Accordingly, we affirm the award of attorney fees against the members of the Board in their official capacities.

The decision of the district court is affirmed in part, and reversed in part. The case is remanded to the district court which in turn should remand to the Board of Parole for the purpose of drawing up regulations implementing the guidelines set out in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

NOTATION AS TO OPINION OF THE DISTRICT COURT

The Memorandum Opinion of the United States District Court for the District of Nebraska, filed October 21, 1977, is not printed herein, but may be found on pages 24 to 48 of the Appendix to the Petition for Certiorari filed herein.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 72-L-335

INMATES OF THE NEBRASKA PENAL COMPLEX,
Plaintiffs,

vs.

JOHN B. GREENHOLTZ, et al.,
Defendants.

AMENDED COMPLAINT

I.

JURISDICTION

This action arises under the United States Constitution and particularly the provisions of the Fourteenth Amendment to the Constitution of the United States and under federal law, particularly the Civil Rights Act, Title 42 of the United States Code, Section 1983.

This Court has jurisdiction of this cause under Title 28 of the United States Code, Section 1343.

II.

Plaintiffs are citizens of the United States of America and are prisoners at the Nebraska Penal Complex.

III.

Defendants are residents of the State of Nebraska and are duly appointed, employed and acting under the color of state law as members of the State of Nebraska Board of Parole.

IV.

Plaintiffs' actions is brought by designated class representatives, Richard C. Walker, William Randolph, Richard J. Leary, and Robert Gamron, who, as inmates at the Nebraska Penal Complex, are members of the class and whose claims are typical of the claims of all the members of the class; such individuals are entitled to, and will, fairly and adequately protect the interest of all persons who are or may become members of the class.

The number of class members is so numerous as to make it impracticable to bring them all before the Court.

V.

Defendants, acting as the Board of Parole, and pursuant to state law, particularly Neb. Rev. Stat. § 83-192, periodically review the records of class members and make determinations regarding the release of class members from confinement on either parole or work release.

VI.

Defendants, in performing their duties as members of the Board of Parole, fail to:

(a) inform the class members of the criteria which they must meet to obtain release on parole or work release;

(b) inform the class members in advance of the date and time of their hearings before the Board of Parole;

(c) permit members of the class to present evidence and call witnesses in their own behalf;

(d) confront the class members with evidence presented opposing the class member's release on parole or work release;

(e) permit the class members to cross-examine witnesses appearing before the Board of Parole in opposition to the class member's release on parole or work release;

(f) maintain a complete and permanent record of all proceedings held in considering the release of class members on parole or work release;

(g) permit full representation of class members by legal counsel in the proceedings had by the Board of Parole and provide such counsel upon a showing of indigent status;

(h) provide class members denied parole or work release with specific written reasons why such parole or work release was denied;

(i) inform class members denied parole or work release of the evidence relied upon in reaching its decision to deny work release or parole.

VII.

The conduct of defendants has deprived, and continues to deprive, plaintiffs of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, plaintiffs pray that an order be entered requiring the defendants to:

(a) inform the class members of the criteria which they must meet to obtain release on parole or work release;

(b) inform the class members in advance of the date and time of their hearings before the Board of Parole;

(c) permit members of the class to present evidence and call witnesses in their own behalf;

(d) confront the class members with evidence presented opposing the class member's release on parole or work release;

(e) permit the class members to cross-examine witnesses appearing before the Board of Parole in opposition to the class member's release on parole or work release;

(f) maintain a complete and permanent record of all proceedings held in considering the release of class members on parole or work release;

(g) permit full representation of class members by legal counsel in the proceedings had by the Board of Parole and provide such counsel upon a showing of indigent status;

(h) provide class members denied parole or work release with specific written reasons why such parole or work release was denied;

(i) inform class members denied parole or work release of the evidence relied upon in reaching its decision to deny work release or parole;

(j) establish a procedure by which individual class members who have sustained damages as a consequence of the unlawful actions alleged herein may be identified and their damages proved, and to grant to such persons monetary damages for the unlawful deprivation of their constitutional rights by the defendants.

Inmates of the Nebraska Penal Complex, Plaintiffs,

By: Nelson, Harding, Marchetti, Leonard & Tate and Brian Ridenour

P. O. Box 82028
Lincoln, Nebraska 68501
(402) 475-6761

Attorneys for Class of Persons Alleging Denial Due Process

By: /s/ Brian Ridenour
One of Said Attorneys

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

ANSWER TO AMENDED COMPLAINT

Come now the defendants herein and for answer to the amended complaint filed by the class of inmates who claim to have been denied due process of law in the parole procedures, show:

1. Defendants admit the allegations of paragraphs 2, 3, and 5 of said amended complaint.

2. Defendants deny each and every other allegation of said amended complaint, and specifically deny that in the conduct of their hearings defendants violate any of plaintiffs' constitutional rights, or deny them due process of law.

WHEREFORE defendants pray that the amended complaint filed herein be denied and dismissed.

John B. Greenholtz, et al.,
Defendants

By: Paul L. Douglas
Attorney General

By: /s/ Ralph H. Gillan
Ralph H. Gillan
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682
Attorneys for Defendants

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 72-L-335

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX,
Plaintiffs,

vs.

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Paroles, et al.,
Defendants.

STIPULATION OF FACTS

The parties hereto, by and through their respec'ive attorneys, hereby stipulate and agree to the following facts:

1. Discretionary parole, as used by the Nebraska Board of Parole, is a release on parole by virtue of an exercise of discretion on the part of the Board of Parole, such release occurring prior to expiration of the maximum term of imprisonment imposed by the sentencing court.

2. An inmate becomes eligible for release on discretionary parole upon completion of his minimum term of confinement less any deductions therefrom for good behavior. In the case of an inmate serving concurrent sentences, his eligibility date for release on parole as to each such sentence is determined separately and the later of such dates applies. In case of an inmate serving consecutive sentences, he becomes eligible for parole upon completion of the total of the minimum terms less any reductions as specified above.

3. In the event a definite term of years is imposed by the sentencing court, the inmate becomes eligible for discretionary parole upon completion of the minimum sentence provided by law less any reductions as specified herein above.

4. An inmate may be released on discretionary parole, with the approval of the sentencing judge, prior to completion of the court-imposed minimum sentence.

5. A parole review hearing is a periodic hearing granted by the Parole Board to all inmates regardless of their elegibility for release on discretionary parole.

6. A parole hearing is a hearing held by the Parole Board to determine whether an inmate eligible for discretionary parole should in fact be granted parole. Such hearings are set by the Parole Board following a parole review hearing.

7. Work release is a release of an inmate by the Director of Correctional Services, upon recommendation of the Parole Board, to permit the inmate to engage in work or paid employment in the community. Such release may occur either by extension of the limits of the inmate's confinement or release from the facilities for prescribed periods of time. Hearings are not held by the Parole Board prior to determination of what recomendation should be made regarding an inmate's release on work release.

8. Inmates at the Nebraska Penal Complex are advised of the approximate date of parole review hearings and parole hearings but they are not advised by the Parole Board as to the exact time and date. Such notification of the approximate time is given at the time of initial imprisonment in the Nebraska Penal Complex or at subsequent parole review hearings. Such notification specifies the month when the next parole review hearing will be held for such inmate. Notification of the exact time and date occurs by the posting of such information at the Nebraska Penal Complex on the date of such hearing.

9. After a parole review hearing an inmate eligible for parole will either be set for a parole hearing or deferred for a future parole review hearing. In the event

of deferral for a future parole review hearing, Form PB-1, a copy of which is attached hereto, is delivered to the inmate. If, after a parole review hearing, the inmate is set for a parole hearing, Form PB-2, a copy of which is attached hereto, is delivered to such inmate.

10. Notification by means of PB-1 of the next parole review hearing occurs from 30 days to one year in advance of such review hearing. Such notification specifies only the month of such parole review hearing. Notification by means of PB-2 of a parole hearing occurs at least 30 days in advance of such parole hearing and specifies only the month of such hearing.

11. Inmates at parole review hearings are not permitted to present evidence or call witnesses in their own behalf. Inmates are permitted at parole hearings to present evidence and call witnesses.

12. At parole hearings the Parole Board may receive evidence of either a testimonal or documentary nature opposing the inmates release on discretionary parole. The inmate is excluded from the hearing room at the time such evidence is received. The inmate is informed that there is opposition to his parole but is not informed of the specific evidence received or allowed to examine any documentary evidence received. Inmates are not permitted to cross-examine witnesses appearing in opposition to the granting of parole.

13. Records of all parole review hearings and parole hearings are maintained in the form of tape recordings of such hearings. Inmates are permitted to be represented by legal counsel provided by such inmates at parole hearings. The Parole Board does not provide indigent in-

mates with legal counsel for parole review hearings or parole hearings.

14. Inmates denied parole following a parole hearing are provided with a letter notifying the inmate of such denial.

15. Written notification to an inmate following a parole review hearing that he is being deferred for reconsideration at a subsequent parole review hearing occurs through use of Form PB-1.

16. Inmates deferred for reconsideration at a subsequent parole review hearing or denied parole following a parole hearing are not advised of the specific evidence relied upon by the Board in reaching its determination.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX,
Plaintiffs,

BY: NELSON, HARDING, YEUTTER LEONARD & TATE and
BRIAN RIDENOUR

P. O. Box 82028
Lincoln, Nebraska 68501

By /s/ BRIAN RIDENOUR
One of Said Attorneys

JOHN B. GREENHOLTZ, et al.,
Defendants

BY: PAUL L. DOUGLAS,
Attorney General of Nebraska

By /s/ RALPH H. GILLAN
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Telephone: (402) 471-2682

Attorneys for Defendant

STATE OF NEBRASKA BOARD OF PAROLE

Case and Record Review

NAME: ....NUMBER: .....DATE: .....
OFFENSE: .....SENTENCE: .....

In accordance with LB 524 relating to the Board of Parole and in compliance with Section 83-1,111 of the Revised Statutes 1972 Supplement, the Board of Parole reviewed your record in your presence. After careful evaluation and in executive session, the Board, by majority vote, deferred your case until ..... for the following reasons.

———a. Your continued correctional treatment, vocational, educational, or job assignment in the facility will substantially enhance your capacity to lead a law-abiding life when released at a later date.

———b. Because of your negative attitude and actions toward rules, regulations and authority, your early release would have a substantially adverse effect on institutional discipline.

———c. Your prior criminal record, including the nature and circumstances of the offenses, indicate that an early release would depreciate the seriousness of your crime and would promote disrespect for the law.

———d. Because of your past use of narcotics and alcohol, there is a substantial risk that you would not conform to the conditions of parole.

———e. Because of your past violations of parole and/or probation, there is a substantial risk that you would not conform to the conditions of parole.

———f. OTHER: .....

RECOMMENDATIONS FOR CORRECTING DEFICIENCIES:

———1. Maintain a good institutional record of work, conduct, attitude and stability.

———2. Participate in programs designed for self-improvement such as skill training, education, Vocational Rehabilitation, etc.

———3. Obtain and maintain good institutional progress reports.

———4. Exhibit some responsibility and maturity.

———5. Obtain no charge of misconduct or disciplinary reports for at least six months prior to Board review or hearing.

——6. Formulate attainable goals for future community citizenship.

BOARD OF PAROLE—Nebraska

.....
Chairman

DISTRIBUTION:

White—Offender
Yellow—Parole Board
Pink—Records Office

BOARD OF PAROLE
STATE OF NEBRASKA

PAROLE BOARD CASE AND RECORD REVIEW

To: ..... NO. ..... DATE .....
OFFENSE ..... SENTENCE .....
TIME SERVED .....

In accordance with LB 524, relating to the Board of Parole and in compliance with amendments in Section 83-1,111, Revised Statutes Supplement, 1972, the Board of Parole reviewed your record in your presence. After careful evaluation and in executive session, the Board by majority vote set your case for final hearing on .....

The Board will require that you continue to maintain a good institutional record free of any misconduct or poor progress reports in order to enhance and justify favorable Board action.

If released on parole, the Board will require as a condition of your parole that you refrain from engaging in criminal conduct and conform to any of the following conditions of parole as set forth in the parole agreement:

(A) Meet your specified family responsibilities.

(B) Devote yourself to an approved employment.

(C) Remain in the geographic limits fixed in your certificate of parole, unless granted written permission to leave.

(D) Report as directed to your district parole officer.

(E) Reside at the place fixed in your certificate of parole and notify your district parole officer of any changes in your address or employment.

(F) Refrain from associating with persons known to you to be engaged in criminal activities.

(G) Satisfy any other conditions specially related to the cause of your offense.

BOARD OF PAROLE—NEBRASKA

.....
Chairman

Distribution:

White—Offender
Yellow—Parole Board
Pink—Records Office

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 72-L-335

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Plaintiffs,

vs.

JOHN B. GREENHOLTZ, Individually and as Chairman, NEBRASKA BOARD OF PAROLE, et al.,

Defendants.

ORDER

(Filed October 21, 1977)

Pursuant to the memorandum opinion filed herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants will implement and put into effect within sixty (60) days from this date procedures which will safeguard the due process rights of the plaintiff class, including at a minimum the following:

(1) Every inmate eligible for parole under Nebraska law must be afforded a formal parole hearing;

(2) At least seventy-two hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole.

(3) Each inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations.

(4) A record of the proceedings at the parole hearing must be maintained.

(5) Within a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole.

IT IS FURTHER ORDERED that plaintiffs' claim that their constitutional right to due process in consideration of eligibility for work release is dismissed.

IT IS FURTHER ORDERED that the plaintiffs shall not recover any money damages in this action, but that plaintiffs may recover their costs as provided by law, including a reasonable attorney fee, the amount of which shall be agreed upon by the parties, or if the parties are unable to agree upon an amount, in an amount to be determined by the court upon the application of the parties.

BY THE COURT:
/s/ Albert G. Schatz
Judge, United States District Court

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 77-1889 September Term, 1977

Inmates of the Nebraska Penal and Correctional Complex, Richard C. Walker, William Randolph, Richard J. Leary, Robert L. Gamron, Frederick L. Grant, Wayne Goham and Charles LaPlante,

Appellees,

vs.

John B. Greenholtz, Individually, and as Chairman, Nebraska Board of Parole; Eugene E. Neal, Catherine R. Dahlquist, Marshall M. Tate, and Edward M. Rowley,

Appellants.

JUDGMENT

(Filed May 18, 1978)

APPEAL FROM the United States District Court for the ——— District of Nebraska.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the ——— District of Nebraska and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for the proceedings consistent with the opinion of this Court.

May 18, 1978

EXHIBIT 10

(UNITED STATES DISTRICT COURT)

DEFERRALS

October 1976-March 1977

SUMMARY

Definitions: Reasons

a. Your continued correctional treatment, vocational, educational, or job assignment in the facility will substantially enhance your capacity to lead a law-abiding life when released at a later date.

b. Because of your negative attitude and actions toward rules, regulations and authority, your early release would have a substantially adverse effect on institutional discipline.

c. Your prior criminal record, including the nature and circumstances of the offenses, indicates that an early release would depreciate the seriousness of your crime and would promote disrespect for the law.

d. Because of your past use of narcotics and alcohol, there is a substantial risk that you would not conform to the conditions of parole.

e. Because of your past violations of parole and/or probation, there is a substantial risk that you would not conform to the conditions of parole.

f. Other.

Definitions: Recommendations for Correcting Deficiencies

1. Maintain a good institutional record of work, conduct, attitude and stability.

2. Participate in programs designed for self-improvement such as skill training, education, Vocational Rehabilitation, etc.

3. Obtain and maintain good institutional progress reports.

4. Exhibit some responsibility and maturity.

5. Obtain no charge of misconduct or disciplinary reports for at least six months prior to Board review or hearing.

6. Formulate attainable goals for future community citizenship.

Reasons	Number
a	285
a, b	13
a, b, c	4
a, b, c, d, e	1
a, b, d	3
a, b, d, e, f	1
a, b, d, f	1
a, b, e	1
a, b, f	2
a, c	19
a, c, d	7
a, c, d, e	4
a, c, e	2
a, c, f	2
a, d	7
a, d, e	5
a, d, e, f	1
a, d, f	1
a, e	4
a, f	6
f	6
Total:	375

Recommendations	Number
1-6	370
NONE	5
Total:	375

OCTOBER 1976

Reasons	Number
a	13
a, b	1
a, b, c	1
a, b, d	1
a, b, d, e, f	1

Reasons	Number
a, b, f	1
a, c	4
a, c, d	1
a, d	2
a, d, e	1
a, d, e, f	1
a, f	1
f	1
Total:	29

NOVEMBER 1976

a	51
a, b, c	1
a, c	2
a, c, d	1
a, f	2
f	1
Total:	58

DECEMBER 1976

a	41
a, b	6
a, b, c	1
a, b, c, d, e	1
a, b, e	1
a, b, f	1
a, c	3
a, c, d	2
a, c, d, e	3
a, c, f	1
a, d	1
a, d, e	1
a, e	2
a, f	2
Total:	66

JANUARY 1977

Reasons	Number
a	58
a, b	1
a, b, d	1
a, b, d, f	1
a, c	5
a, c, d	1
a, c, e	1
a, d	3
a, d, e	1
a, d, f	1
f	2
Total:	75

FEBRUARY 1977

a	53
a, b	2
a, c	2
a, c, e	1
a, d	1
a, e	2
a, f	1
f	2
Total:	64

MARCH 1977

a	69
a, b	3
a, b, c	1
a, b, d	1
a, c	3
a, c, d	2
a, c, d, e	1
a, c, f	1
a, d	2
Total:	83

TOTAL: October 1976-March 1977: 375

EXHIBIT 11

(UNITED STATES DISTRICT COURT)

SUMMARY OF REASONS

GIVEN FOR DENIALS

January, 1975-November, 1976

Reason	Number
Disciplinary Report	46
NONE	8
Removal from Work Release	5
Pending Charges	3
Conviction of Additional Offense	2
Attitude and Conduct	2
Violation of Post Care Rules (Rescissions of Unexecuted Paroles)	2
Not Eligible	1
Request of Inmate	1
Non-acceptance by Another State for Parole Supervision	1
Actions on Work Release	1
Escape from Work Release	1
Leaving State while on Parole	1
Failure to Obtain Employment	1
Failure to Complete Skill Training	1
Short Period of Time on Educational Release	1
Lacking of Approved Parole Program	1
Continued Correctional Treatment or Vocational Training Needed	1
Substantial Risk of Noncompliance with Conditions of Parole	1
Depreciate Seriousness of Crime	1
Total:	81

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE H. NEAL, CATHERINE R. DAHLQUIST, MARSHALL N. TATE, and EDWARD M. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE OCHAM and CHARLES LaPLANTE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR RESPONDENTS

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Tel: (402) 475-6761
Attorney for Respondents

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS--Continued

STATUTES CITED

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

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No. 78-201

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JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM and CHARLES LaPLANTE,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MEMORANDUM FOR RESPONDENTS

INTRODUCTION

For purposes of this memorandum, respondents accept and incorporate herein by this reference those portions of petitioners' Petition for a Writ of Certiorari entitled Jurisdiction, Questions Presented, Statutes Involved and Statement of the Case. Copies of the opinions below and pertinent statutes are contained in the appendices to the Petition.

ARGUMENT

I. The Questions Presented By Petitioners Should Be Resolved by This Court in Light of the Conflict of Decisions in the Circuit Courts.

The judgment of the Eighth Circuit in this action reversed certain portions of the district court's judgment. Those portions reversed were favorable to respondents herein. Because of such reversals respondents would have asked this Court to consider the same questions presented by petitioners had not petitioners filed their petition seeking certiorari. Such questions encompass the concerns addressed by the six circuit courts which have reviewed the issue of whether due process applies to parole release proceedings. Petitioners correctly urge that there is clear conflict of decision among these circuit courts which can only be resolved through consideration of the constitutional question by this Court. The Eighth Circuit's decision (Appendix A in brief for petitioners), however, is not representative of a third split in the circuits as suggested by petitioners. Rather, its holding that due process applies to parole release proceedings is clearly in accord with the decisions of a majority of the circuit courts. Franklin v. Shields, 569 F.2d 784, 800 (4th Cir. 1978) (en banc); United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976); Childs v. United States Board of Parole, 511 F.2d 1270, 1280 (D.C. Cir. 1974); United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), vacated as moot, 419 U.S. 1015 (1974). Contra, Scott v. Kentucky Parole Bd., No. 74-1899 (6th Cir. Jan. 15, 1975) vacated and remanded to consider mootness, 429 U.S. 60 (1976) on remand Sub. nom. Bell v. Kentucky Parole Bd., 556 F.2d 805 (1977); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.) (en banc), vacated and remanded to consider mootness, 414 U.S. 809, dismissed as moot, 501 F.2d 992 (5th Cir. 1973). It does vary, however, from those prior decisions in that it is the first circuit court opinion to have considered the broad spectrum of rights which attach to an inmate seeking parole release rather than narrowly deciding the constitutionality of one or two aspects of the parole release proceeding and only hinting at the other considerations.

II. This Court's Prior Decisions Demand That Due Process Apply To Parole Release Proceedings.

This Court's own decision in Montayne v. Haymes is determinative on this issue. Where an inmate was transferred from one prison to another, the Court held that a due process procedure is not required before effecting the transfer ". . .absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." 427 U.S. 236 (1976) (Emphasis added).

Contrary to petitioner's assertion that a Nebraska inmate lacks a justifiable expectation that he will be released "in the absence of misconduct or other specified events" (Brief for petitioners at 10), Neb. Rev. Stat. § 83-1,114 specifically orders, as recognized by the Eighth Circuit, the release of an inmate unless certain listed factors are present which cause the board members to form the opinion that his parole should be deferred. This seems to be exactly the sort of "right or justifiable expectation rooted in state law" which this Court noted as requiring the protection of due process in Wolff v. McDonnell, 418 U.S. 539 at 558 (1974).

We must in this regard take exception to the petitioners' argument that since some of the criteria listed in Neb. Rev. Stat § 83-1,114 are subjective in nature and not susceptible to proof, an evidentiary hearing would serve no purpose. Precisely because some of these criteria are not susceptible to proof or even factual definition, due process protection is required to insure that the decisions reached by the board are not arbitrary and abusive. Moreover, as some of the criteria statutorily required for consideration are objective and thus more readily provable, the inmate eligible for parole should be allowed to present his proof of compliance with these criteria, i.e., his plans for employment and residence upon release, his availment of the various self-help facilities for rehabilitation.

III. As the Circuit Courts have Varied Widely in the Amount and Type of Due Process They Have Found to be Demanded in Parole Release Proceedings, the Issue is Ripe for Resolution by this Court.

While the varying opinions of the circuit courts holding that due process applies to parole release proceedings may be explained on the basis of each having presented only specific issues, rather than the general question of what elements of due process are applicable, sufficient confusion between such opinions exists to justify final resolution by this Court. This action presents the ideal case for consideration of this important issue inasmuch as it requests a determination of what elements are due rather than a question of whether a specified element or elements are due. Further, because of its status as a class action, it is not likely to become moot, as have previous cases presenting these issues to this Court.

Respondents note that portion of the Eighth Circuit's opinion stating:

> In any event, we hold that to comply with the due process clause the Board has to provide a formal parole hearing only when the inmate first becomes eligible for parole. (Brief of petitioners at App. 17).

Respondents take specific exception to such holding and state their intention to argue that an annual hearing is required. This is particularly true in view of the provisions of Neb. Rev. Stat. § 83-1,111(4) which states:

> If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

This statute was apparently overlooked by the Eighth Circuit in its opinion. However, independently of the statutory provisions, respondents strongly assert that due process in any event requires at least an annual hearing for eligible inmates. Such position is bolstered by the provisions of Neb. Rev. Stat.

§ 83-1,111(4) which provides a "right or justifiable expectation rooted in state law", Montayne v. Haymes, supra, and Wolff v. McDonnell, supra. Respondents believe that this issue and that of whether inmates eligible for parole are entitled to present other than documentary evidence at a parole hearing are issues fairly comprised within the questions presented for review by the petitioners.

IV. The Present Procedures of the Nebraska Parole Board do not Comply with the Due Process Clause.

Because petitioners have devoted a portion of their petition to an assertion that the present procedures of the Nebraska Parole Board comply with the due process clause, it is necessary to respond thereto in a brief fashion. It is sufficient in this respect to note, as both the district and circuit court did, some of the ways in which the present procedures are deficient: (1) adequate notice of parole hearings is not given; (2) the criteria utilized by the Board of Parole are not disclosed to the inmates; (3) inmates are not permitted to hear, nor are they advised of the content of, adverse testimony; (4) inmates are not always advised of the reasons for denial of parole; and (5) inmates are never advised of the evidence relied upon in denying parole. Determination of the questions of the applicability and the scope of due process requirements, require determination of the question of compliance.

CONCLUSION

For the foregoing reasons, respondents concur with petitioners in respectfully submitting that the petition for a writ of certiorari should be granted.

Brian K. Ridenour
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned, counsel of record for respondents, certifies that a copy of the foregoing Memorandum For Respondents was served upon Ralph H. Gillan, attorney of record for petitioners by mailing said copy to him at 2115 State Capitol, Lincoln, Nebraska, on the 1st day of September, 1978.

Brian K. Ridenour
Attorney for Respondents

In The

Supreme Court of the United States

October Term, 1977

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM, and CHARLES LaPLANTE,

Respondents.

BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CASES

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

STATUTES

TABLE OF CONTENTS—Continued

OTHER AUTHORITIES

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska is unpublished, and is reproduced in the Appendix to the Petition for a Writ of Certiorari on pages 24a to 48a. The opinion of the Court of Appeals for the Eighth Circuit is reported at 576 F. 2d 1274 and reproduced in the Appendix at pages 2 to 25.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals was entered on May 18, 1978. A timely petition for rehearing en banc was denied on June 9, 1978. The petition for certiorari was filed on August 4, 1978. Certiorari was granted on October 2, 1978.

STATUTES INVOLVED

The following sections of the Nebraska statutes are pertinent herein:

Neb. Rev. Stat. § 83-192 (Reissue 1976):

"The Board of Parole shall:

"(1) Determine the time of release on parole of committed offenders eligible for such release;

"(2) Fix the conditions of parole, revoke parole, issue or authorize the issuance of warrants for the arrest of parole violators, and impose other sanctions short of revocation for violation of conditions of parole;

"(3) Determine the time of discharge from parole;

"(4) Visit and inspect any facility, state or local, for the detention of persons charged with or convicted of an offense, and for the safekeeping of such other persons as may be remanded thereto in accordance with law;

"(5) Serve in an advisory capacity to the Director of Correctional Services in administering parole services within any facility and in the community;

"(6) Interpret the parole program to the public with a view toward developing a broad base of public support;

"(7) Conduct research for the purpose of evaluating and improving the effectiveness of the parole system;

"(8) Recommend parole legislation to the Governor;

"(9) Review the record of every committed offender, whether or not eligible for parole, not less than once each year. Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record, his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and his prospects for future parole;

"(10) Make rules and regulations for its own administration and operation;

"(11) Appoint and remove all employees of the board and delegate appropriate powers and duties to them;

"(12) Transmit annually to the Governor a report of its work for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

"(13) Exercise all powers and perform all duties necessary and proper in carrying out its responsibilities under the provisions of this act."

Neb. Rev. Stat. § 83-1,111 (Reissue 1976):

"(1) Every committed offender shall have a hearing before a majority of the members of the Board of Parole within sixty days before the expiration of

his minimum term less any reductions. Every committed offender shall be interviewed within sixty days prior to his final parole hearing by a member of the Board of Parole. The hearing shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

"(2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing. The decision shall be by majority vote of the board. The decision shall be based on the entire record before the board, which shall include the opinion of the member who presided at the hearing. If the board shall deny parole, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

"(3) If the board fixes the release date, such date shall be not more than six months from the date of the committed offender's parole hearing, or from the date of last reconsideration of his case, unless there are special reasons for fixing a later release date.

"(4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

"(5) The release of a committed offender on parole shall not be upon the application of the offender, but by the initiative of the Board of Parole. No application for release on parole made by a committed offender or on his behalf shall be entertained by the board. Nothing herein shall prohibit the Director of Correctional Services from recommending to the board that it consider an individual offender for release on parole."

Neb. Rev. Stat. § 83-1,114 (Reissue 1976):

"(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

"(a) There is a substantial risk that he will not conform to the conditions of parole;

"(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

"(c) His release would have a substantially adverse effect on institutional discipline; or

"(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

"(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

"(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

"(b) The adequacy of the offender's parole plan;

"(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

"(d) The offender's intelligence and training;

"(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

"(f) The offender's employment history, his occupational skills, and the stability of his past employment;

"(g) The type of residence, neighborhood or community in which the offender plans to live;

"(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

"(i) The offender's mental or physical makeup, including any disability or handicap which may affect his conformity to law;

"(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

"(k) The offender's attitude toward law and authority;

"(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

"(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

"(n) Any other factors the board determines to be relevant."

Neb. Rev. Stat. § 83-1,115 (Reissue 1976):

"Before making a determination regarding a committed offender's release on parole, the Board of Parole shall consider the following:

"(1) A report prepared by the institutional caseworkers relating to his personality, social history and adjustment to authority, and including any recommendations which the staff of the facility may make;

"(2) All official reports of his prior criminal record, including reports and records of earlier probation and parole experiences;

"(3) The presentence investigation report;

"(4) Recommendations regarding his parole made at the time of sentencing by the sentencing judge;

"(5) The reports of any physical, mental and psychiatric examinations of the offender;

"(6) Any relevant information which may be submitted by the offender, his attorney, the victim of his crime, or by other persons; and

"(7) Such other relevant information concerning the offender as may be reasonably available."

———o———

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole by the Nebraska Board of Parole?

2. If the Due Process Clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole, what procedures are constitutionally mandated?

3. Whether the procedures followed by the Nebraska Board of Parole comply with all constitutionally mandated procedures, if any?

———o———

STATEMENT OF THE CASE

This case was filed as a class action in 1972 by a number of inmates of the Nebraska Penal and Correctional Complex against the members of the Nebraska Board of Parole, of which John B. Greenholtz was and is Chairman. It was brought under 42 U. S. C. § 1983, and the complaint alleged violations of the inmates' constitutional rights in various respects.

As no one group could properly represent all of the classes, the district court designated different inmates as representatives of the various classes, and appointed counsel to represent each class. It was eventually treated as three separate suits, since the different claimed violations were not related. There were separate trials and appeals with respect to the various classes. We are here concerned with the class claiming that they were denied procedural due process in the granting or denial of discretionary parole.

In Nebraska, paroles are of two types, mandatory and discretionary. Mandatory parole is given when an inmate has served his maximum sentence less good-time credit. See Neb. Rev. Stat. § 83-1,107 (1) (b). We are not concerned herein with mandatory parole.

An inmate becomes eligible for discretionary parole upon serving his minimum term, less good-time credits. It is that type of parole which is the subject of this action.

Parole hearings are of two types, parole review hearings and final parole hearings. The exact procedure is based partly on statute, and partly on the practices that have been followed by the board for a number of years.

Parole review hearings must be held with every committed offender at least once each year, whether or not he is eligible for parole, under the provisions of Neb. Rev. Stat. § 83-192 (9). Section 83-1,111 also requires a hearing for eligible inmates at least once each year. The board has construed this as simply calling for a parole review hearing, rather than for a final parole hearing.

Final parole hearings have, in some instances, been called simply "parole hearings," and, as a matter of fact, the stipulation entered into herein (A30) called them simply "parole hearings." This, however, is a misnomer, as the parole review hearings are also "parole hearings." Section 83-1,111 refers to a "final parole hearing," and members of the board usually do, also (R43, 61, 67).

Final parole hearings for discretionary parole are never automatic, but are set, at the discretion of the board, following a parole review hearing. At the parole review hearing the board reviews the inmate's record and talks to him. He is not permitted to offer evidence, but the board will accept letters that he may wish to present (R55-56). If the inmate is not then eligible for parole, he is deferred until a later parole review hearing, or until he is eligible. If he is eligible, the board will either schedule him for a final parole hearing, or defer him to another parole review hearing, not later, of course, than one year later (R44-45).

If the board concludes at the parole review hearing that an eligible inmate may be a good candidate for parole, he is set for a final parole hearing. At a final parole hearing the inmate may present evidence, including calling witnesses. He is permitted counsel. He is not

permitted to hear opposing testimony, or, of course, cross-examine opposing witnesses (R56).

Inmates are advised in advance of the month in which their parole review or final parole hearings will be held, and are notified of the exact time by posting at the Nebraska Penal and Correctional Complex on the date of the hearing.

Following a parole review hearing, inmates are sent one of two form notices (A35-37). One form notifies the inmate that his case has been deferred until a specified month, and lists 5 specified reasons which roughly track the reasons for denial enumerated in Neb. Rev. Stat. § 83-1,114, and a blank for other reasons. The form also contains recommendations for correcting deficiencies.

The other form notifies the inmate that his case has been set for final hearing in a certain month.

Parole counselors are provided at the penitentiary. Each inmate is assigned to a particular counselor, who meets with his inmates periodically—about six times a year—and is available whenever the inmate wants to talk to him. The counselor attends parole review hearings and final parole hearings, and assists the inmate in the preparation of his parole plan (R49-54).

Following a final parole hearing, the inmate is notified either that he will be paroled, or that he has been denied and deferred until another parole review hearing. If he has been denied parole, he is notified by letter, which also states the reason for denial. Respondents found eight such letters written in a period of 23 months which did not contain reasons (R12). The records of the hearings

on those eight inmates were introduced. They showed that one of the eight was not eligible because of loss of good time credits, one said at the hearing he did not want a parole, and one did not appear at the hearing, but sent a note to the board waiving his hearing. One of the members of the board testified that failure to include reasons for denial was a departure from the practice of the board (R57).

Following a trial on May 31, 1977, the district court found that procedural due process applied to the parole proceedings, and that the board's practices in some respects exceeded constitutional requirements, and in other respects fell short. The court said the following procedures were required: (1) Every inmate eligible for parole must be afforded a formal parole hearing. (2) At least 72 hours prior to the time of the hearing the inmate must receive written notice of the date and hour of his hearing, accompanied by a concise listing of the factors the board might consider in evaluating an eligible inmate for discretionary parole. (3) The inmate must be allowed to present evidence in support of his application for parole, subject to prison security considerations. (4) A record of the proceeding was to be maintained. (5) Within a reasonable time following the parole hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole (Appendix to Petition for Certiorari, pp. 39-43).

On appeal, the Court of Appeals affirmed in part and reversed in part, holding that procedural due process applied, but modifying the required procedures to the following: (1) Every inmate is to receive a formal parole

hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the board. (2) Every inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the board in making its determination. (3) Subject to security considerations, every inmate is allowed to appear in person before the board and present documentary evidence in support of his application. In the absence of unusual circumstances, an inmate does not have a constitutional right to call witnesses in his behalf. (4) A record of the proceedings which is capable of being reduced to writing must be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole (A23-24).

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SUMMARY OF ARGUMENT

Procedural due process is more clearly indicated in the situation where action of the government changes the condition of a citizen to his detriment than where the government simply refuses to change a condition at his request. If due process applies at all to the latter situation, the requirements are far less than in the former.

Whether an inmate will be granted discretionary parole is dependent, by statute, upon reaching an opinion that parole for this particular inmate is proper. It is not dependent upon any particular factual determinations, and

no facts that may be found to exist entitle an inmate to discretionary parole. All of the criteria by which the board is to reach the decision are subjective, except facts which have already been determined in a due process hearing. A due process type hearing is ill-suited for reaching such determinations, and this court has not required them in this type of situation.

Since denial of parole is not necessarily based on misconduct on the part of the inmate, no stigma attaches to such denial, and therefore no protectable liberty interest is involved.

The procedures mandated by the Court of Appeals carry with them almost no benefits to the inmates, since they will never be able to show facts entitling them to parole, if the board thinks they should not have one. So far as the board is concerned, however, it will require more final hearings, and will require much wasted effort on the part of the board and the parole counselors.

Requiring the board to state the essential facts relied upon will force the board to make a record in each case, probably introducing evidence, to justify their reaching subjective conclusions not easily susceptible of proof. It will probably change the focus of the hearing from the statutory criteria to superficial "facts." It may very well lead to judicial review in state court, which does not now exist, or to federal habeas corpus or civil rights actions based upon alleged inadequacy of evidence to sustain denials.

Nebraska now gives each inmate a hearing each year. He can present letters to the board, and attempt to convince them of his worthiness for parole. The board con-

siders his entire record. If he is denied, he is told the reasons for denial. If he is granted a final parole hearing, he can have counsel and present evidence. The procedures more than comply with those prescribed by the other circuits which have said due process applies at all.

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ARGUMENT

I.

Procedural due process does not apply to hearings conducted to determine whether an inmate should be granted discretionary parole.

We submit that the Court of Appeals has taken cases decided by this Court dealing with adverse changes in a person's present condition, which changes were authorized only upon proof of specific facts, and has misread them to apply to the parole granting or denial situation. We believe none of this Court's decisions point in the direction taken by the Court of Appeals.

A. Due Process Requirements Are Less Appropriate for a Continuation of a Condition than for an Adverse Change in a Condition.

The Court of Appeals relied heavily on *Morrissey v. Brewer,* 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); *Wolff v. McDonnell,* 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); and *Gagnon v. Scarpelli,* 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973). All of those cases (as do almost all other decisions of this Court

that have come to our attention) involved adverse action taken by an administrative or judicial body to change the condition of the person against whom the action was taken.

In *Morrissey v. Brewer, supra,* the Chief Justice, in footnote number 8 quoted the following language from *United States ex rel. Bey v. Connecticut Board of Parole,* 443 F. 2d 1079, 1086 (2d Cir. 1971):

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

An article by Judge Henry B. Friendly found in 123 U. of Pa. L. Rev. 1267 has been referred to several times by this Court. In that article Judge Friendly draws a distinction between cases where the government is seeking to take some action against a citizen and those in which it is simply denying a citizen's request, and says (pp. 1295-1296):

> "But the distinction has a notable lineage. The famous Article 39 of Magna Carta, often seen as the origin of the concept of due process, speaks in terms of the king's going out or sending against a free man, not of his refusing a request. And whatever the mathematics, there is a human difference between losing what one has and not getting what one wants. This point is convincingly developed, in the context of revocation as distinguished from denial of parole, in Chief Justice Burger's opinion in Morrissey v. Brewer."

Even in *Wolff v. McDonnell,* where the Court held procedural process applied to the loss of good time cred-

its, the Court said that it was qualitatively and quantitatively different from revocation of parole or probation. Further, in *Wolff v. McDonnell* there *was* a change effected by the action of the administrative body, since credits which the inmate had earned were taken away from him. As the Court pointed out, this might not ultimately result in any adverse consequences. Nevertheless, it was the result of affirmative action on the part of the prison officials, not refusal to act. We are here concerned with a refusal to grant parole, a purely negative action. It is therefore another step beyond *Wolff v. McDonnell* in that respect.

The Fifth Circuit has relied on such distinction in denying procedural due process in the parole granting area. See *Brown v. Lundgren,* 528 F. 2d 1050 (5th Cir. 1976), and *Scarpa v. United States Board of Parole,* 477 F. 2d 278 (5th Cir. 1973), vacated and remanded to consider mootness, 414 U. S. 809 (1973), dismissed as moot, 501 F. 2d 992 (5th Cir. 1973).

We are not suggesting that under no circumstances could due process procedures be required for the administrative denial of requested relief. In a clear case of entitlement to relief, conditioned upon specific factual determinations, perhaps the citizen could not be denied the relief without an opportunity to be heard. We are simply saying that the basis for expectation of change in status must be much clearer to bring the Due Process Clause into play than is the case of taking from the citizen a benefit he is presently enjoying. And if due process is held to apply, the extent of the required procedures should be less in the case of a continuation of a status than in the case of a change in status.

B. A Prisoner in Nebraska Has no Liberty or Property Right, Founded on State Law, to Release on Discretionary Parole.

The Due Process Clause of the Fourteenth Amendment protects life, liberty, and property from deprivation by the state without due process of law. Since the prisoner has already been deprived of his liberty by sentence of the court, a parole has been dealt with in property terms. For example, Mr. Justice Douglas said in *Morrissey v. Brewer* (dissenting), at 408 U. S. 493 that a parole was a deed, which when conferred gives a parolee a degree of liberty which is often associated with property interests. In *Wolff v. McDonnell, supra,* this Court said that the analysis as to liberty parallels the accepted due process analysis as to property. We will therefore discuss the issue in property terms, to see whether a prisoner has a "property" interest in his expectation of a discretionary parole. The sine qua non of such a property interest is a reasonable expectation, based upon state law or practice, that he will receive such a parole in the absence of specific factual determinations justifying a refusal to grant it.

Without question there will be a contention that Neb. Rev. Stat. § 83-1,114 (Reissue 1976) gives prisoners in Nebraska such a property right, in view of the language of that section that the board "shall" order his release unless it is of the opinion that his release should be deferred for the itemized reasons. The Court of Appeals made a passing reference to this section in supporting its decision, although it did not explore this issue in depth, but talked in very general terms about the right to procedural due process in the parole granting process. No attempt was made to base its decision on the specific language of the

Nebraska statute. If it had, Nebraska would at least have had an opportunity to cure the situation by amending its statute.[1]

We submit, however, that Neb. Rev. Stat. § 83-1,114 (Reissue 1976) would not support the decision, in any event, because the statute does not condition denial of parole upon any factual basis, but solely on the subjective determination of the board as to the propriety of giving the particular inmate a parole. An evidentiary hearing is ill-suited for making such a determination.

Neb. Rev. Stat. § 83-1,114 (Reissue 1976) was not intended to vest any rights in the inmates to a parole, but was intended, instead, to constitute instructions to the Board of Parole as to the factors to be taken into account in reaching its decisions. In Nebraska, at least, the court has looked with extreme disfavor upon unbridled discretion resting in administrative bodies. In *Lincoln Dairy Co. v. Finigan,* 170 Neb. 777, 104 N. W. 2d 227 (1960), for example, the court said, with respect to the grant of power to an administrative agency:

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1 We have checked the statutes of other states to determine in what respects they differ from ours. Many states authorize the parole board to adopt regulations with respect to the granting of parole, so it is difficult to determine what the exact situation is in those states. Some statutes provided that the board "may" grant parole after various subjective findings. Others provide that the board "shall" do so. See, e. g., Code of Ala. 1975, § 15-22-26; West's Ann. Calif. Codes § 3041 (b); Title 17-1-201, Colo. R. S. 1973; § 906.4, Iowa Code Ann.; S. Dak. C. L. 23-60-12; § 40-3614, Tenn. Code Ann.; T. 28, § 1051, Vt. Stat. Ann. North Carolina has a statute similar to Nebraska's. It provides that the board may refuse to release an inmate on parole if it reaches a certain specified conclusion. See § 15A-1371, N. C. G. S.

> "The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act. . . ."

We therefore submit that the rather detailed factors to be taken into account under Neb. Rev. Stat. § 83-1,114 (Reissue 1976) are simply a reflection of the Legislature's awareness that a grant of authority to the board to parole in its unfettered discretion might not pass muster in the Nebraska Supreme Court.

We also submit that the use of the word "shall" instead of "may" has no significance. It is, of course, conditioned on the board's having a certain opinion, not upon its finding particular facts. Furthermore, in this context there can be no difference in the meaning of "shall" and "may," unless we are to assume that the use of the word "may," in some of the state statutes was intended to authorize completely arbitrary or even discriminatory actions.

For example, the Iowa statute is very similar to that of Kansas. Section 906.4, Iowa Code Ann. provides that the board "shall" parole the inmate "when in its opinion there is a reasonable probability that such person can be released without detriment to the community or to himself or herself." Kan. Stat. Ann. § 22-3717, on the other hand, provides that the authority "shall have the power" to release inmates when, in the opinion of the Authority, "there is a reasonable probability that such persons can be released without detriment to the community or to themselves."

To suggest that there is any difference between the Iowa and Kansas statutes is to say that in Iowa the board

must release the inmate when it reaches the prescribed conclusion, but that in Kansas the parole authority which has reached that same conclusion may refuse to release, for undisclosed reasons of its own, which reasons were not specified by the Legislature. In Nebraska, at least, we suspect that our Supreme Court would not countenance such a construction.

Every parole authority reaches its decision to parole or not to parole on the basis of considerations identical, or very similar, to those listed in Neb. Rev. Stat. § 83-1,114 (Reissue 1976). The fact that the Legislature articulated them, instead of authorizing the board to do so by regulation, has no significance so far as their creating a property interest in the inmate is concerned. Nor does the use of the word "shall" have significance, in view of the subjective nature of determinations to be made by the board.

We therefore submit that the decision of the Court of Appeals cannot be sustained on the basis of any peculiarities of the Nebraska statute. The situation in Nebraska is no different from that in every other state where a board is given discretionary authority to grant or deny paroles. Whether set out in the statute, the board's regulations, or a uniform practice, every parole board has such standards, unless we are to assume that its actions are purely whimsical.

C. A Right which Gives Rise to Procedural Due Process Must Be Conditioned upon Findings of Specific Facts, as Opposed to Subjective Conclusion Reached by the Decision-Making Body.

This Court has, almost without exception, found a "property" right requiring procedural due process only when the deprivation of that right was required to be based upon a finding of specific facts. There is no such requirement in Nebraska, nor, so far as we are aware, in any other state, when discretionary parole is denied.

In *Board of Regents v. Roth,* 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), this Court said that to have a property interest in a benefit, a person must have a legitimate claim to entitlement thereto. In the case of parole, of course, that claim must rest upon the statute. Neb. Rev. Stat. § 83-1,114 does not create such a legitimate claim.

Even in cases in which this Court held procedural due process to apply, it has, time after time, stressed the factual nature of the required findings. In *Goldberg v. Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 96 S. Ct. 1011 (1970), this Court quoted from *Green v. McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959), to the effect that where governmental action seriously injures a person, *and the reasonableness of the action depends on fact findings,* the evidence used must be disclosed so that he has an opportunity to show that it is untrue.

In *Morrissey v. Brewer, supra,* the Chief Justice pointed out that a parole could be revoked only upon proof of the violation of the conditions of the parole, and that

the first step in the revocation process involved the wholly retrospective factual question of whether such violation had occurred. Mr. Justice Douglas, in a concurring and dissenting opinion, said that the purpose of the required hearing was to determine the fact of parole violation.

In *Goss v. Lopez,* 419 U. S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975), the Court required some sort of hearing, "to determine whether the conduct has occurred." In *Gagnon v. Scarpelli, supra,* the issue was whether the probationer had violated the terms of probation, a purely factual determination. In *Wolff v. McDonnell, supra,* this court said:

> ". . . Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (1951), said that fairness can rarely be obtained by secret, one-sided determination of *facts* decisive of rights.

In *Arnett v. Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974), Mr. Justice White, concurring and dissenting, said that if termination of government employment was for reasons of pure inefficiency it was at least arguable that a hearing would serve no useful purpose, and that judgments of that kind were best left to the discretion of administrative officials. The types of determinations to be made with respect to the granting

of parole are even less adapted to resolution in an evidentiary hearing than the example given by Mr. Justice White. The gist of the various opinions in *Arnett v. Kennedy* holding the employees had a protectable interest based that holding on the fact that the statute provided that he could not be discharged except for cause, a factual issue susceptible of proof.

In *Perry v. Sindermann,* 408 U. S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), this Court said that if the terminated professor could establish a tenure system under which he could not be terminated except for "sufficient cause," he would be entitled to a hearing to determine whether such cause existed. In *Mathews v. Eldridge,* 424 U. S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), the Court said that central to the evaluation of any administrative process is the nature of the relevant inquiry.

None of the four reasons for denial of parole listed in Neb. Rev. Stat. § 83-1,114 (Reissue 1976) are based on factual determinations, but are specifically based on the "opinion" of the board. Further, the fourteen factors the board is to take into account are not readily susceptible of "proof," or if they are, are matters of record. There are no "facts" listed in that section which would require either a denial or a granting of parole. Even factor (1), the inmate's conduct in the facility, including disciplinary reports, is only something the board is to consider in reaching its decision. The disciplinary reports are matters of record, and the inmate will already have had a due process hearing with respect to such reports, pursuant to *Wolff v. McDonnell, supra.*

This Court said in *Morrissey v. Brewer, supra:*

> ". . . Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime."

The only hard "facts," as distinguished from opinions, that go into the parole decision have already been determined in a due process hearing. It certainly should not be required that the board hold another hearing to consider the accuracy of the previous fact finding. In *Dixon v. Love,* 431 U. S. 105, 52 L. Ed. 2d 172, 97 S. Ct. 1723 (1977), this Court held a hearing unnecessary to relitigate traffic convictions, where the driver had already had a full judicial hearing.

The only case authored by this Court of which we are aware in which procedural due process was required under standards remotely approaching those specified in Neb. Rev. Stat. § 83-1,114 is *Kent v. United States,* 383 U. S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045 (1966). Even in that case, several factual determinations were prescribed, and, apparently, all of the factors were required to be considered. For example, a showing would be required as to whether the offense was committed in an aggressive, violent, premeditated, or willful manner.

Furthermore, *Kent* involved a proceeding in a court of law, in which due process procedures are much more commonly expected and demanded than would be expected of an administrative body. It involved, in effect, at least, a procedure in a criminal trial, since it was a preliminary step necessary to the criminal trial. Under those circumstances, we would expect more formal procedures to be required in the *Kent* situation than would be required of

an administrative agency. In *Morrissey v. Brewer* this Court drew a distinction between a criminal prosecution and revocation of parole, indicating that a criminal prosecution carried more due process rights.

When the administrative action was not conditioned on factual determinations, this Court has refused to require procedural due process. *Meachum v. Fano,* 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976), and *Montayne v. Haymes,* 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (1976), made that clear. In *Meachum v. Fano* the Court said:

> "Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, *defeasible only upon proof of specific acts of misconduct.* Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of *specified events.* On the contrary, transfer in a wide variety of circumstances is vested in prison officials. The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in Wolff v. McDonnell is totally nonexistent in this case." (Emphasis supplied.)

The Court then went on to say that the fact that the inmate's conduct may have influenced the transfer decision did not give rise to a right to a hearing to determine the accuracy of the charges, because the inmate's legal rights would not have been violated whether or not the misconduct was proved. So long as the prison officials had discretion to transfer for whatever reason or for no reason at all, the prisoner's expectation to remain at a particular prison so long as he behaved himself was "too ephemeral and insubstantial to trigger procedural due process protections."

We point out that *Meachum v. Fano* and *Montayne v. Haymes* involved adverse changes in condition, instead of a refusal to make a change, so, as we showed in a previous section of this brief, due process procedures are even less called for in the parole denial situation.

In *Smith v. Organization of Foster Families for Equality and Reform,* 431 U. S. 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977), Mr. Justice Stewart, concurring, said that, "New York confers no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances." He pointed out that transfers are made under a variety of circumstances, often involving no more than informed predictions of what would best serve the safety and welfare of the child. Therefore, he would have held, the predicate for invoking the due process clause—the existence of state-created liberty or property —was missing.

In *Board of Curators, University of Missouri v. Horowitz,* — U. S. —, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978), the Court did not decide whether the dismissed student had constitutionally protected interests, but assuming that she did, held that she had been afforded all that she was entitled to, even though she was given no hearing at all before the decision-making body. The Court pointed out the significant differences between the failure of a student to meet academic standards and the violation of valid rules of conduct, saying that the former requires far less stringent procedural safeguards than the latter, and said:

> ". . . Like the decision of an individual professor as to the proper grade for a student in his course,

> the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making."

The situation of the dismissed student closely resembles that of the inmate denied parole. The student was dismissed (and denied graduation) because of various academic failures and intangible considerations, not susceptible of direct proof. No "charges" were made against her. A hearing before the decision-making body would have been of little value. The inmate, also, has not necessarily been "charged" with anything (or, if he has, he has already had a hearing). The decision as to whether to "graduate" him, by giving him a parole, is based upon "an expert evaluation of cumulative information," not susceptible of direct proof. The parole board's decision to hold the "student" over for more "schooling," instead of "graduating" him should certainly require no more elaborate procedures than were required in *Horowitz.*

The risk of wrongful use of whatever procedure is employed must be judged "in the context of the issues which are to be determined in that proceeding." *Mitchell v. W. T. Grant Co.,* 416 U. S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974). We cannot imagine what type of evidence could be adduced that an inmate's release would or would not depreciate the seriousness of the inmate's offense, or have a substantially adverse effect on institutional discipline. Whether he will or will not conform to the conditions of parole, or whether his continued incarceration will "substantially enhance his capacity to

lead a lawabiding life when released at a later date" are simply conclusions the board must reach from a consideration of his entire record. To require "evidence" on such matters is simply to substitute the opinions of the witnesses for those of the board, which is statutorily vested with the authority to reach conclusions on such matters.

D. A Denial of Parole Carries with it No Stigmatizing Effect Giving Rise to a Protected Liberty Interest.

In *Board of Regents v. Roth, supra,* the Court pointed out that in declining to hire the respondent, the state made no charges against him that might damage his standing in the community, since it did not base its action on a charge of dishonesty or immorality. The Court indicated that had the state done so, a hearing would be required to permit him to clear his name. See also, *Bishop v. Wood,* 426 U. S. 341, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976); *Joint Anti-Fascist Refugee Committee v. McGrath, supra;* and *Cafeteria Workers v. McElroy,* 376 U. S. 886, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961).

We submit that no tenable claim can be made that a denial of parole will have such an effect on the inmate's reputation as to deprive him of a liberty interest, requiring due process.

In the first place, of course, the inmate's reputation will have been somewhat tarnished by his original conviction, so it will be hard for him to argue that denial of parole damaged it further. The terminated employees in *Roth* and *Bishop* were far more likely to have been damaged in their employment prospects.

More important, however, is the fact that denial of parole is not based upon specific charges of misconduct, and no such implication can be legitimately drawn from such denial. There is no public announcement of reasons for denial. If misconduct was a factor in the denial, as we have previously pointed out, he will already have had a due process hearing on the misconduct. A denial, therefore, has no stigmatizing effect, and the inmate suffers no consequence in addition to the denial of his immediate freedom. *Board of Regents v. Roth* teaches that the immediate consequences of the administrative action is not enough to trigger procedural due process rights.

E. A Balancing of the Benefits of Additional Procedures Against the Costs Militates Against Such Requirements.

An argument may be made that the procedures ordered by the Court of Appeals are not burdensome, and that some of them are already afforded to inmates by statute or by practice of the board, and that therefore no harm to petitioners will result in affirming the judgment of the Court of Appeals. We submit that such an argument is fallacious.

First, we have previously discussed the subjective nature of the criteria used in determining whether an inmate shall be paroled. A formal evidentiary hearing will add little or nothing to the parole board's understanding of the inmate and his probability of successfully completing a parole. The decision has been and will continue to be made on the basis of the total record of the inmate, and a subjective appraisal of his character. All that such

a hearing will add will be largely irrelevant facts, and opinions from biased or uninformed sources.

The Court of Appeals ordered that each inmate have a formal parole hearing upon first becoming eligible for parole. Under present statutes and practices he has a parole review hearing within sixty days before becoming eligible for parole, and each year thereafter. We submit that few, indeed, will be the inmates who are paroled after the mandated formal parole hearing, whose records are such that the board would not have scheduled them for a final parole hearing under present procedures.

The Court of Appeals required that each inmate receive a written notice of the date and hour of the hearing reasonably in advance, together with a list of the factors to be considered by the board. They are presently notified of the month of the hearing, and are notified of the exact time through posting of such information at the penal complex on the date of the hearing. Certainly they are given sufficient time in which to prepare any presentation they may wish to make, particularly their parole plan, which is, no doubt, the single most important part of their bid for parole. So far as the inmates are concerned, they are seldom gone on vacation or have conflicting appointments on the day their parole hearing is set. If they have witnesses, there might be some advantage to having an exact time set in advance, but there is no evidence that the board is not accommodating in that situation under present practices.

If they are notified of the factors to be considered by the board, the notification will, no doubt, be in the exact words of the statute. While this might not be particularly burdensome, it does seem somewhat ludicrous to require, *as a constitutional right,* that they be notified as to statutory provisions.

We will not discuss the cost-benefit ratio of the requirement that inmates be allowed to appear before the board and present documentary evidence, since they are now given that right. Likewise, the board now preserves a record of its hearings which is capable of being reduced to writing. We do, of course, deny that such procedures are constitutionally mandated.

The fifth requirement of the Court of Appeals was that each inmate who is denied parole must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial. They are now told the reasons for denial, and in view of the subjective nature of the determinations involved, a statement of the evidence relied upon will seldom have any real meaning to them.

We therefore submit that the benefit to the inmates of the procedures mandated by the Court of Appeals will be insignificant. The problems it will create for the Board of Parole will not be.

In *Mathews v. Eldridge,* 424 U. S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), this Court held that a determination of the dictates of due process required consideration of the private interest affected, the risk of erroneous deprivation of that interest and the probable value of additional procedures, and the Government's interest, including fiscal and administrative burdens involved in the additional requirements. See also, *Ingraham v. Wright,*

430 U. S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977). A careful examination of the realities will show that the costs far outweigh the almost nonexistent benefits.

First, let us consider the requirement that all inmates receive a formal parole hearing upon becoming eligible for parole. At present, they receive a parole review hearing, and if the board feels they are likely candidates for parole, they are given a formal (final) parole hearing. What this order means, in effect, is that those inmates who the board feels, after a personal interview and a review of their records, are not then ready for parole must, nevertheless, be given a formal parole hearing. What percentage of the inmates would be affected by this order is not disclosed by the evidence, but would, we assume, be substantial. A formal parole hearing is, of course, a more lengthy procedure than a parole review hearing, which lasts an average of about ten minutes. The added hearings would increase the load of the board, which already must conduct many hundreds of such hearings each year.

More important, however, is the burden on the parole counselors. Neb. Rev. Stat. § 83-1,114 requires the board, in considering an inmate for parole, to take into account the adequacy of the offender's parole plan. No plans are prepared for parole review hearings, but if an inmate is set for a final hearing, a parole plan must be prepared. One of the things that must be included in the plan is employment while on parole. The inmate is, of course, in no position to line up a job, so someone, presumably the parole counselor, must do so. Counselors will therefore be confronted with inmates who everybody in his right

mind knows have no chance whatever of being granted an early parole, but for whom parole plans must be prepared. Failure to prepare one would make the hearing a farce, as no one would be paroled without one. Good faith would require someone to contact prospective employers, to get them to promise a job to someone who has no realistic chance of being paroled! In addition to the added work on the counselors, it probably will make it more difficult to line up work for people who actually will be paroled.

Probably the most troublesome part of the Court of Appeals' order is the requirement that the inmate be furnished with an explanation of the essential facts relied upon in denying parole. As we have pointed out again and again, the board's decision is seldom based upon articulable "facts," but upon an overall appraisal of the man, his record, his crime, etc. Just as it will be difficult to present meaningful evidence to justify the board's action, it will be difficult or impossible to summarize that evidence. The board can state the reasons for denial, as, for example, that the inmate's release would depreciate the seriousness of the crime or promote disrespect for law, but what "facts" would one rely upon in reaching that conclusion?

While we are not trying to raise imaginary specters, we are concerned that a requirement of a due process hearing may result in judicial review of the actions of the board, either by direct appeal in the state court, or by habeas corpus or civil rights actions in federal court.

At the present time, there is no judicial review of denial of parole. Perhaps there will not be, even if the

hearings are held to be constitutionally mandated. Judge Friendly, in his article in 123 U. of Pa. L. Rev. 1267 says, at page 1294:

> "Although I have not researched the state decisions, my impression is that, up to this time, judicial review in the area of mass justice has largely been limited to questions of fair procedure, and there has been little attempt to obtain review for lack of substantial evidence or even for arbitrariness or capriciousness. Would that it may remain so! The spectacle of a new source of litigation of this magnitude is frightening."

Nevertheless, there is a very real danger that a holding that a formal evidentiary hearing is constitutionally mandated, and that the board must state the facts it relies on to deny parole may result in judicial review. Since, under Neb. Rev. Stat. § 83-1,111 (Reissue 1976), release on parole is not on the application of the inmate but upon the initiative of the board, we do not consider such hearings to be contested cases. However, if they are required by the Constitution, they may well be held to be contested cases, and appealable in state court. The volume of litigation would be overwhelming, in view of many inmates' love of litigation.

In *Goldberg v. Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), we find the statement that the decision-maker's conclusion "must rest solely on the legal rules and evidence adduced at the hearing," and the further statement that the requirement of a statement of the reasons for the determination and the evidence relied on is to demonstrate compliance with "this elementary requirement."

If this language is held applicable to the parole release hearings, it threatens the continuation of the parole system, in Nebraska, at least. It will certainly be argued that the board has the burden of presenting evidence justifying denial. Often the reason will simply be the nature of the crime committed, or the board's appraisal of the man. It may be very difficult to make a record which would convince an appellate court, looking at a cold record, that a denial was justified. In any event, the board would be faced with the burden of making such a record in every case, enormously increasing the workload of the board and its almost nonexistent staff. A discussion of the implications of mandating procedural due process in this situation is found in *Dorado v. Kerr,* 454 F. 2d 892 (9th Cir. 1972), cert. denied, 409 U. S. 934, in which the Court indicated that to require such procedures would convert the present flexible administrative sessions into judicial hearings, would change the nature of the California indeterminate sentencing procedure, bringing it into the state court system, and would greatly increase the judicial load of California courts.

Besides the problem of state appellate review, it would seem that *Goldberg v. Kelly* would permit federal habeas corpus or civil rights actions. If a denial must be based solely on legal rules and "evidence" adduced at the hearing, we presume that a federal court might hold that an inmate's constitutional rights were denied if no evidence was adduced to justify denial, or the court felt that the evidence adduced was insufficient, or did not sustain the denial. This Court, in *Wolff v. McDonnell,* hinted quite clearly that judicial review was a possibility, where fundamental constitutional rights were abridged.

We therefore submit that the seemingly innocuous relief ordered by the Court of Appeals is not such at all, but carries far-reaching implications. If forced into such a position we suspect that many states will simply do away with discretionary parole, and opt for fixed sentences.

II.

If due process applies to parole release proceedings, Nebraska already complies with all required procedures.

Mr. Justice Stevens, in his dissent in *Scott v. Kentucky Parole Board,* 429 U. S. 60, 50 L. Ed. 2d 218, 97 S. Ct. 342 (1976), listed cases from the Fifth and Sixth Circuits holding due process does not apply to parole release, and cases from the Second, Fourth, Seventh, and D. C. Circuits holding that it did. The Court of Appeals showed the same split. We believe that the Third and Ninth Circuits should be added to those holding that it does not apply. See *Madden v. New Jersey State Parole Board,* 438 F. 2d 1189 (3d Cir. 1971), and *Dorado v. Kerr, supra.*

As can be seen from Mr. Justice Stevens' footnote, those circuits that have held that it applies have, in general, limited the required procedures to a statement of reasons for denial of parole. In *Franklin v. Shields,* 569 F. 2d 784 (4th Cir. 1978), *cert. denied,* 98 S. Ct. 1659, the original panel had ordered more extensive procedures, but the court sitting en banc reversed the panel and limited the required procedures to a statement of reasons for denial. *Morrissey v. Brewer, supra,* and *Mathews v. Eldridge, supra,* teach that due process is flexible and "calls for such procedural protections as the particular situation demands." The factors cited in *Mathews v. Eldridge,* 424 U. S. at 335, show that the procedures ordered by the Circuit Court are excessive, even if this Court concludes that due process applies at all.

Neb. Rev. Stat. § 83-1,111 (Reissue 1976) now requires that an inmate denied parole must be told the reasons for denial and recommendations for correcting deficiencies. The board complies with this statutory requirement. (The fact that in a very few cases over a period of almost two years the board failed to state the reasons can certainly have no constitutional significance, or call for corrective action by the federal courts.)

Nebraska statutes also provide for an annual parole review, with personal appearance before the board and counseling with the board concerning his progress and prospects for future parole. He is permitted to present letters favoring his parole to the board. If he is scheduled for a formal parole hearing, he is permitted to call witnesses, present documentary evidence, and have counsel. Both parole review hearings and final parole hearings are tape recorded. Each inmate has a parole counselor to advise him as to what is needed to get a parole.

We submit that if due process applies at all, what is given by Nebraska far exceeds what is required. The Court of Appeals was pioneering in this area, and we submit that it went far astray.

It appears that the Court of Appeals was attempting to pattern its requirements to fit those required in *Wolff v. McDonnell,* but was faced with a problem that no

"charges" are brought against inmates seeking parole. Therefore, in place of the requirement that advance written notice of the charges be given the inmate, as required in *McDonnell,* the court ordered that a list of the factors to be considered by the board must accompany the notice of hearing, or be posted at the penal institutions. We have previously commented on the incongruity of requiring notification of the contents of a statute as being constitutionally mandated.

If a hearing is required, each inmate now gets one annually, pursuant to statute. In view of the type of determinations to be made, we submit that the parole review hearings comply with any constitutional requirements. See *Goss v. Lopez,* 419 U. S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). A formal, fact-oriented hearing such as is implied in the Court of Appeals' opinion would not be helpful, but would only tend to divert the focus from the statutory criteria.

The requirement of a "full and fair explanation, in writing, of the essential facts relied upon" is particularly burdensome and uncalled for, not only because of the difficulty of articulating the "facts," but because it implies that evidence must be adduced and made a part of the record supporting the board's action.

In *Meachum v. Fano, supra,* this Court cautioned against placing the Due Process Clause "astride the day-to-day functioning of state prisons and involv[ing] the judiciary in issues and discretionary decisions that are not the business of federal judges." In *Hoffman v. Pursue, Ltd.,* 420 U. S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), this Court said that when federal courts are confronted with requests for interference with state civil functions, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. And in *Rizzo v. Goode,* 423 U. S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976), the Court said that in such a situation an injunction should be granted only in the most extraordinary circumstances. These principles, we submit, indicate a denial of relief to respondents herein.

CONCLUSION

We submit that this Court should hold that this case is governed by *Meachum v. Fano and Montayne v. Haymes,* and that procedural due process does not apply. If this court disagrees, the required procedures should be limited to giving a denied inmate a written statement of the reasons for denial. The procedures Nebraska now follows more than comply with any required by the Fourteenth Amendment. The decision below should be reversed.

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Boards of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, AND EDWARD M. ROWLEY,

Petitioners,

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM, AND CHARLES LAPLANTE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF FOR THE RESPONDENTS

CONSTITUTIONAL PROVISIONS AND ADDITIONAL STATUTES INVOLVED

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following additional sections of the Nebraska statutes are pertinent hereto:

NEB. REV. STAT. § 83-1,110 (Reissue 1976).

"(1) Every committed offender shall be eligible for release on parole upon completion of his minimum term less reductions granted in accordance with this act. A committed offender shall be eligible for parole prior to the expiration of the minimum term whenever the sentencing judge or his successor in office shall give his approval for the parole of such offender.

(2) every committed offender sentenced to consecutive terms, whether received at the same time or at any time during the original sentence, shall be eligible for release on parole when he shall have served the total of the minimum terms, less reductions granted in accordance with the provisions of this act. The maximum terms shall be added to compute the new maximum term, which, less reductions granted in accordance with the provisions of this act, shall determine the date when his discharge from the custody of the state becomes mandatory."

NEB. REV. STAT. § 83-1,112 (Reissue 1976).

"(1) Each committed offender eligible for parole shall, in advance of his parole hearing, have a parole plan in accordance with the rules of the Board of Parole. Whenever the board determines that it will facilitate the parole hearing, it may furnish the offender with any information and records to be considered by it at the hearing.

(2) An offender shall be permitted to advise with any person whose assistance he desires, including his own legal counsel, in preparing for a hearing before the Board of Parole."

STATEMENT OF THE CASE

This action was instituted pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Nebraska[1] as a class action[2] on behalf of all inmates (Respondents herein) incarcerated in the

[1] The original complaint in this action was filed on November 13, 1972 (A.1) and alleged 1) unlawful denial of parole or work release because members of the plaintiff class had exercised their rights of access to the courts; 2) denial of parole or work release because of racially discriminatory reasons; and 3) violation of the Due Process Clause in parole release and work release proceedings. The due process claims of the Inmates were dismissed, but the order of dismissal was not certified as an appealable order. The other claims proceeded to trial and were ultimately dismissed on the merits. The previous order dismissing the due process claims was vacated on the same date the other claims were dismissed. Counsel for the Inmates herein was appointed by the district court and the claims of the Inmate class were processed as a separate lawsuit.

[2] This action was certified as a proper class action on November 29, 1973 (A.1) prior to its original dismissal (*See* n. 1). When

Nebraska Penal and Correctional Complex, Lincoln, Nebraska (hereinafter referred to as "the Inmates"). The parties named as defendants (Petitioners herein) were the members of the State of Nebraska Board of Parole, in both their individual and official capacities (hereinafter collectively referred to as "the Board").

Trial occurred on May 31, 1977 (A. 1) and judgment finding that the Inmates had been denied procedural due process, specifying the minimal requirements of due process, and requiring the Board to implement procedures encompassing such requirements (A. 38-39) was entered on October 21, 1977 (A. 2).[3] A timely appeal to the United States Court of Appeals for the Eighth Circuit resulted in an Opinion (A. 2-25) affirming the district court's determination that the Due Process Clause of the Fourteenth Amendment applied to parole release proceedings but modifying the minimum requirements of due process applicable thereto. Such opinion and accompanying order (A. 40) were entered May 18, 1978.[4]

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the order of dismissal was vacated and the action reinstated, the district court ordered that it proceed as a class action, if the inmates so desired. The inmates elected to proceed on a class action basis.

[3] The Inmates' claims of denial of due process in work release proceedings and for monetary damages were dismissed by the district court. No appeal from such dismissals was taken.

[4] The Board's appeal to the Eighth Circuit also challenged the propriety of attorney fees taxed as costs pursuant to 42 U.S.C. § 1988. Such allowance was affirmed by the Eighth Circuit (A.24) and the Eighth Circuit subsequently allowed additional fees. The Board's Petition for a Writ of Certiorari did not present any question regarding such allowances of attorney fees.

The amended complaint (A. 25-29) alleged among other things that the Board failed to: 1) inform the Inmates of the criteria utilized in determining whether inmates should be placed on parole; 2) inform the Inmates of the date and time of their hearings; 3) permit the Inmates to present evidence and call witnesses; 5) permit cross-examination of witnesses appearing in opposition to parole; 6) maintain a complete and permanent record of all parole release proceedings; 7) permit representation by legal counsel and provide such counsel upon a showing of indigency; 8) provide inmates denied parole with a written statement of reasons for denial; and, 9) inform inmates denied parole of the evidence relied upon. (A. 27).

The Board consists of five members, two of which are parttime. (Pl. Ex. 3, p. 1; R. 3, 3). All such members are appointed by the Governor of the State of Nebraska. NEB. REV. STAT. § 83-189 (Reissue 1976). Under Nebraska's statutes the Board is charged with the responsibility of determining when and whether an inmate should be released upon parole. NEB. REV. STAT. §§ 83-192(1) and 83-1,114(1) (Reissue 1976).

As relevant hereto, two types of parole proceedings are conducted by the Board. The first, a case and record review (hereinafter referred to as "review hearing"), as required under NEB. REV. STAT. § 83-192(9) (Reissue 1976) and as stipulated to by the parties, is to be conducted each year, regardless of the eligibility of the inmate for parole. (A. 31). During the period of July 1, 1975 through June 30, 1976, 1,645 such review

hearings were held for inmates at the Nebraska Penal and Correctional Complex. (Pl. Ex. 3, p. 17, R. 3, 3).

The other type of proceeding conducted by the Board is a parole hearing (hereinafter "Parole hearing") required by NEB. REV. STAT. § 83-1,111 (Reissue 1976). As hereinafter discussed, such proceeding is more formalized in nature and, as stipulated, is granted only to those inmates who are eligible for discretionary parole and who are set for such a hearing by the Board after a review hearing. (A. 32-33). Between July 1, 1975 and June 30, 1976, 327 such parole hearings were held. (Pl. Ex. 3, p. 17, R. 3, 3).

Pursuant to Nebraska's statutory framework, review hearings are to include an inquiry into the circumstances of the offender's offense, presentence investigation reports, prior social history and criminal record, the inmate's conduct, employment, and attitude while imprisioned, and any physical and mental examination reports available. The Board is required to meet with the inmate and "counsel him concerning his progress and his prospects for future parole". NEB. REV. STAT. § 83-192(9) (Reissue 1976).

By contrast, NEB. REV. STAT. § 83-1,111 (Reissue 1976) governs the timing of parole hearings. Subsection (1) thereof requires a parole hearing within sixty days prior to the expiration of the inmate's minimum term less any reductions (the inmate's eligibility for Parole date as determined under NEB. REV. STAT. § 83-1,110 (Reissue 1976)). If the Board, following a parole

hearing defers an inmate for later reconsideration, a parole hearing is required to be held at least once a year until a release date is fixed. NEB. REV. STAT. § 83-1,111(4) (Reissue 1976).

NEB. REV. STAT. § 83-1,114 (Reissue 1976) provides the Board with specific statutory instructions for determining whether an inmate should be released on parole. It mandates the release on parole of any eligible inmate, unless the Board finds that:

> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT. § 83-1,114(1) (Reissue 1976). The Board is further provided with fourteen factors which must be considered in any parole release determination.[5]

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[5] *Neb. Rev. Stat.* § 83-1,114(2) (Reissue 1976) provides:

> In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:
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> (a) The offender's personality, including his maturity, sta-

In practice the Board has equated the annual parole hearing requirement of NEB. REV. STAT. § 83-1,111(4) (Reissue 1976) with the review hearing requirement of

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bility, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority; particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(l) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(m) Any other factors the board determines to be relevant.

NEB. REV. STAT. § 83-192(9) (Reissue 1976). *See* Petitioner's Brief, p. 9,. Such practice results in the Board's ability to prevent otherwise eligible inmates from receiving a parole hearing by deferment following a review hearing. The deferment may be for up to one year and may occur repeatedly. Indeed, in the case of Robert Gamron, one of the inmates testifying at the trial of this matter, deferral occurred on three separate occasions, despite the inmate's eligibility for parole. (R. 26).

Review hearings and parole hearings differ markedly in the manner in which they are conducted. Review hearings last on an average from 5 to 10 minutes. (R. 16, 43). Although there was some testimony to the contrary (R. 55), the parties hereto have stipulated that inmates at review hearings are not permitted to present evidence or call witnesses in their own behalf (A.33). Additionally, inmates are neither advised of nor allowed to examine any evidence, records, etc. which might adversely affect their chance of parole. (R. 17-19, 35). For example, the Board considers the prison records of the individual but does not allow such individual to examine those records. (R. 19, 36, 46, 47, 56).

Parole hearings are more formalized in nature. At such hearings inmates are allowed to present evidence and call witnesses in their own behalf. (A. 33; R. 40, 56). However, if evidence of either a testimonial or documentary nature opposing the inmate's release on parole is received, the inmate is excluded from the

hearing room at the time such evidence is received. (A.33). The inmate is informed only that there is opposition to his parole, but is not given any explanation as to the nature of the evidence received. (A. 33; R. 59). Neither is the inmate permitted any right of cross-examination as to adverse testimony received.[6] (A.33).

Inmates are notified either at the time of their original confinement or at subsequent review hearings or parole hearings of the month during which their next review hearing or parole hearing will be held. Notification occurs from 30 days to one year in advance of the hearing and never specifies the precise date. Notification of the precise date and hour occurs through posting of such information at the Penal Complex on the date of the hearing. (A. 32; R. 35). By its own admission, the Board does not advise the Inmates of the criteria utilized in determining whether they should be placed upon parole. (R. 45). The inmates who testified at trial indicated that they had never been advised by anyone of such criteria. (R. 22, 34). Testimony presented by the Board indicated that parole counselors are charged with this responsibility

[6] It is interesting, at this point, to note one anomaly developed through the trial judge's questioning of one of the Board members. It appears that the Board does permit an inmate's legal counsel to remain in the hearing room during presentation of any such adverse testimony. (R. 68-70). However, the Board does not provide indigent inmates with legal counsel. (A. 33-34). It would thus appear that only when an inmate can afford legal counsel, can he be assured of knowledge of or attempt to rebut adverse evidence received.

(R. 50), but the testimony further indicated that in at least some instances no such communication actually occurs (R. 21, 50).

Just as the nature of the two types of hearings vary, the notification of results given to the inmates varies. In the case of review hearings, preprinted Parole Board forms are utilized to notify the inmate of the results. Deferral (the equivalent of denial) is noted on Form PB-1 (A. 35-36). If the Board should decide that the inmate is a likely candidate for parole, a parole hearing will be set and the inmate advised of such hearing through utilization of Form PB-2. (A. 36-37).

The Board customarily and uniformly utilizes the preprinted reasons checklist contained in the PB-1 for explanation of its actions. For the period of October, 1976 through March, 1977, of the 375 inmates eligible for parole but deferred following a review hearing, 285 were provided a PB-1 form on which only Item (a) had been checked. (A. 42). That Item reads as follows:

> Your continued correctional treatment, vocational, education, or job assignment in the facility will substantially enhance your capacity to lead a law-abiding life when released at a later date.

The Board acknowledged that in a majority of the cases this is the only reason specified for deferral.[7] (R.

[7] *Neb. Rev. Stat.* § 83-1,111 (Reissue 1976) requires a written statement of both reasons for denial and recommendations for correction of deficiencies. Form PB-1 contains a standardized

45). The testimony further established that the Inmates are not advised as to which of the alternative reasons for deferral listed in Item (a) applies to their individual cases. (R. 23, 30). Moreover, the testimony of inmate Gamron specifically establishes that when efforts are made to obtain an explanation from the Board as to the meaning of this Item or other Items, no such explanation is given. (Pl. Ex. 16, Items 18, 19 and 21; R. 27, 28). The letters contained in such Exhibit 16 chronicle the efforts made by this inmate to obtain information from the Board as to the reasons for deferral and the lack of response by the Board thereto.

If an inmate succeeds in gaining a parole hearing after his review hearing, but is denied parole, the inmate is notified of such denial by letter. For the period of January, 1975 through November, 1976, of the 81 letters of denial sent by the Board, 46 indicated simply that denial was because of a disciplinary report. (A. 45). While the phraseology was often different, many of these simply indicated the "filing" of such a disciplinary report. In eight cases no reason whatsoever was stated in the letter of notification (Pl. Ex.

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listing of six deficiencies. (A. 35-36). The Board's own testimony indicates that all six Items are always checked (R. 45). Of the 375 PB-1's referred to *supra*, 370 showed all Items 1 through 6 as having been checked (A. 42). Yet, Richard C. Walker, one of the class representatives, testified that all items were checked in his case, including Item 2, requiring participation in self-improvement programs, despite Walker's participation in all such available programs (R. 38).

12, R. 12, 12), although in some of these cases a verbal statement of the reason for denial was made at the hearing. A representative of the Board testified that these eight letters were a departure from their normal procedures (R. 57), but acknowledged that many of the other letters were insufficient in scope. (R. 63).[8]

Inmates deferred for reconsideration at a subsequent review hearing or denied parole following a parole hearing are not advised of the evidence relied upon by the Board in reaching its determination. (A. 34). With respect to both review hearings and parole hearings, a record is maintained by the Board in the form of tape recordings.[9]

Upon the basis of the foregoing facts, the district court concluded that minimal due process of law re-

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[8] It is interesting to note that while the Board attempts to comply with the requirement of *Neb. Rev. Stat.* § 83-1,114 (Reissue 1976) for a statement of recommendations for correction of deficiencies in the review hearing context (*See* n. 7), letters of denial following a parole hearing seldom contain any such recommendation.

[9] The requirements imposed by the district court and the Eighth Circuit varied slightly in this regard. The district court would require a written record (Pet. App. 42) while the Eighth Circuit required only a record capable of being reduced to writing (A. 21,24). While the Inmates find the Eighth Circuit lesser requirement acceptable, it is important that the requirement as to the quality of recordings be maintained. By stipulation (R. 58) the Board was permitted to introduce after conclusion of the trial the transcripts of eight parole hearings. These transcripts contained numerous examples of inaudible statements or responses by members of the Board or the involved inmate.

quired the Board to institute procedures encompassing items:

1) Every inmate eligible for parole under Nebraska law must be afforded a formal parole hearing;

2) At least 72 hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the Board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole;

3) Each inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations;

4) A written record of the proceedings at the parole hearing must be maintained;

5) Within a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole. (A. 38-39).

By affirming in part and reversing in part, the Eighth Circuit required:

1) Every inmate is to receive a formal parole hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the Board.

2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the Board in making its determination.

3) Subject to security considerations, every inmate is allowed to appear in person before the Board and present documentary evidence in support of his application. In the absence of unusual circumstances an inmate does not have a constitutional right to call witnesses in his behalf.

4) A record of the proceedings which is capable of being reduced to writing must be maintained.

5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole. (A. 23-24).

SUMMARY OF ARGUMENT

I.

This case presents the Court with the question of whether denial of parole is the denial of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) clearly indicates that conditional liberty while on parole is an interest entitled to protection under the Fourteenth Amemdment. In so holding this

Court recognized the significant interest a prisoner has in parole. Such interest is even stronger where created by a state law which also limits the ability of the State to deny such conditional liberty. Nebraska's statutes, principally NEB. REV. STAT. § 83-1,114 (Reissue 1976) establish an inmate's right to parole and restrict the Board's ability to deny such right. Under such circumstances the Due Process Clause of the Fourteenth Amendment must apply to the parole release decision-making process. *Morrissey* v. *Brewer, supra; Wolff* v. *McDonnell,* 418 U.S. 539 (1974).

The conclusion that due process of law must be accorded to inmates involved in parole release proceedings is not altered by the existence of discretion in the Board's decision and the requirement that it consider subjective factors. Although decisions may be predictive and discretionary, the Due Process Clause nevertheless applies. *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972). In the context of parole release proceedings, reliance upon the discretionary matters involved in concluding that due process of law does not apply would be tantamount to readopting the right/privilege dichotomy which this Court has so frequently rejected. *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Morrissey* v. *Brewer, supra.* Nor is it pertinent to argue that the Due Process Clause applies only where an adverse change in condition occurs. Even though denial of parole will not change an inmate's present status, this Court has frequently recognized that an interest protected by the Due Process Clause

is not removed from such protection because the individual involved does not presently enjoy that right.

Equally as important, however, is the nature of the interest at stake. Since parole is freedom from physical restraint, parole has been considered a protected liberty within the meaning of the Due Process Clause, *Morrissey* v. *Brewer, supra,* and the decision with respect to such interest should be subject to the Due Process Clause regardless of the existence or nonexistence of a state statute raising a presumption of release. It is the underlying interest which determines whether the Due Process Clause applies and not the underlying function of the administrative proceeding. That the proceeding is discretionary in nature rather than fact-finding in nature is not a pertinent difference. Where the decision will affect the inmate's term of confinement as opposed to the conditions of confinement, due process must apply. *Wolff* v. *McDonnell, supra.* Due process of law must, under the circumstances of this case, apply to parole release proceedings in the State of Nebraska.

II.

Once it is determined that Nebraska parole release proceedings are subject to the Due Process Clause, this Court must then determine what process is due. *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). In arriving at a resolution of this question, the Court must balance the governmental and private interest

affected, giving due considerations to (1) the private interests involved, (2) the risk of an erroneous deprivation thereof under present procedures and the value of additional safeguards and (3) the government's interest. *Mathews* v. *Eldridge,* 424 U.S. 319, 334-335 (1976).

An inmates interest in obtaining the conditional liberty represented by parole is obviously great. But beyond this, both the inmate and the Board have concurrent interest in the accurate finding of fact and the informed use of discretion. Such interest serves the inmate's ultimate desire for freedom and serves the state's interest in neither preventing successful rehabilitation nor improperly risking the safety of society through premature release. These interest favor the imposition of minimal due process in parole release proceedings and far outweigh any administrative burden which may result to the Board.

The foregoing analysis suggests the following procedures are appropriate:

(1) Every inmate who is eligible for parole under Nebraska law must be afforded a hearing each time the parole decision is made at which the inmate is (a) entitled to appear; (b) permitted to present documentary evidence; (c) permitted, subject to prison security considerations, to call witnesses in his own behalf; and (d) allowed to hear and examine, or, if prison security considerations require, informed of any testimony received or factual information in the possession of the Board which might lead to an adverse decision.

(2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance thereof. This notice shall contain a list of the factors which may be considered by the Board in making its determination.

(3) A record of the proceedings which is capable of being reduced to writing must be maintained.

(4) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

ARCUMENT

I. AN INMATE'S INTEREST IN THE PAROLE RELEASE DECISION IS A LIBERTY INTEREST WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Since Nebraska Has Created A Liberty Interest In Parole, It May Not Deprive An Inmate Of Such An Interest Without Procedural Safeguards.

The question before this Court is whether the decision to deny Parole is a deprivation of liberty within the meaning of the Due Process Clause of the Four-

teenth Amendment.[10] This determination to a certain extent requires a definition of the concept of liberty. Although the liberty guaranteed by the Fourteenth Amendment has never been exactly defined, this Court has consistently stated:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. . . . In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

Board of Regents v. *Roth*, 408 U.S. 564, 572 (1972). See also *Ingraham* v. *Wright*, 430 U.S. 651 (1977) (holding that a school child has a protected liberty interest in avoiding corporal punishment while in the care of public school authorities).

In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court concluded that the liberty enjoyed by a parolee while on parole was liberty within the realms of the Fourteenth Amendment and could not be terminated without some orderly process. In reaching its conclusion this Court applied a test which involved a determination not of the weight but of the nature of the interest at stake. The distinction based upon whether a parolee's interest was a "right" or a "privilege" in determining the applicability of due process was rejected, and instead the Court considered the function of parole in the correctional process and concluded that since the liberty of the parolee included many of the core values of unqualified liberty, the decision to terminate it without due process would inflict a grievous loss on the parolee. *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 484.

The question this Court is being asked to decide, however, goes not to the revocation of parole but rather to the *decision* of whether to grant or deny parole. It is necessary, therefore, to determine the nature of the inmate's interest in the parole decision.

[10] Of the circuit courts of appeals which have decided the issue, four have held the Fourteenth Amendment does apply to parole release proceedings. *See Coralluzzo* v. *New York State Parole Board*, 566 F.2d 375 (2nd Cir. 1977), cert. dismissed as improvidently granted, 435 U.S. 912 (1978); *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925 (2nd Cir. 1974), vacated as moot, 419 U.S. 1015 (1975); *Franklin* v. *Shields*, 569 F.2d 784 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978); *Bradford* v. *Weinstein*, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); *United States ex rel. Richerson* v. *Wolff*, 525 F.2d 797 (7th Cir. 1975); *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974). *Cf. Hill* v. *Attorney General of the United States*, 550 F.2d 901 (3rd Cir. 1977) (by discussing the constitutional adequacy of reasons given for denial of parole, the court implies that the Due Process Clause applies). *Contra, Cruz* v. *Skelton*, 543 F.2d 86 (5th Cir. 1976); *Brown* v. *Lundgren*, 528 F.2d 1050 (5th Cir.), cert. denied, 429 U.S. 917 (1976); *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (5th Cir.) (en banc), vacated as moot, 414 U.S. 809 (1973); *Scott* v. *Kentucky Parole Board*, No. 74-1899 (6th Cir. Jan. 15 1975), remanded to consider mootness, 429 U.S. 60 (1976), reaffirmed *sub nom, Bell* v. *Kentucky Parole Board*, 556 F.2d 805 (1977), cert. denied, 434 U.S. 960 (1978).

The nature of an inmate's interest in the decision of the Board to grant or deny parole is an interest in the most fundamental concept of liberty, freedom from physical restraint. The Board's decision conclusively determines whether an inmate will be allowed, subject to the conditions of his parole, to be gainfully employed and free to be with family and friends and form other enduring attachments of normal life, or be subjected to continued incarceration. As the United States Court of Appeals for the District of Columbia suggested in *Childs* v. *United States Board of Parole,* 511 F.2d 1270, 1278 (D.C. Cir. 1974):

> The deprivation due to revocation of the conditional liberty enjoyed by a parolee demonstrates the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished by the government under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a "grievous loss" or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimum standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities.

The effect of the Board's decision on an inmate's liberty in a parole release proceeding is the same as that of *Morrissey,* conditional liberty versus incarceration. Where the result of such a decision is of such tremendous consequence, our system of law requires some type of notice, hearing, and statement of reasons for denial. *Cf., Kent* v. *United States,* 383 U.S. 541, 554 (1966).

Even though a prospective parolee is currently confined, there is a right to be considered for parole under state law and the privilege of an earlier release if the Board grants parole. *Bradford* v. *Weinstein,* 519 F.2d 728, 732 (4th Cir. 1974). It is the Board's decision of whether to grant or deny parole which must be subject to the protections afforded by the minimum procedures of due process. Only by affording the minimum procedures of due process can an inmate be assured that his interest in parole is not arbitrarily abrogated.

The State of Nebraska by statute has created the inmates' interest in parole. However, as was stated in *Wolff* v. *McDonnell,* 418 U.S. 539, 588 (1974):

> [A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government.

This statutorily created liberty interest in parole is indistinguishable from an inmate's statutorily created

interest in good time credit which this Court in *Wolff* v. *McDonnell, supra,* held to be a protected liberty interest. In that case, Mr. Justice White stated:

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to be a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers* v. *McElroy,* 367 U.S. 886, 894, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). But the state having created the right to good time and itself recognizing that its depreviation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Id. at 557.

Nebraska has not only statutorily created the inmate's right to be considered for parole, but in addition has prescribed specific factors which must be considered and the criteria which must be present before parole can be denied. Under the Nebraska statutory scheme, an inmate must be released on parole

unless the Board finds the individual unfit for parole because one or more specified criteria are present. NEB. REV STAT. § 83-1,114 (Reissue 1976). The Nebraska statute clearly limits the discretion of the Board in denying parole, and thus, the expectation the inmate has in being granted parole triggers procedural due process protection. Whether that expectation is regarded as an entitlement, a presumption of release, or whether it is simply based upon the use of the word "shall" by the Nebraska legislature[11] in di-

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[11] The Board suggests that the word "shall" in *Neb. Rev. Stat.* § 83-1,114(1) (Reissue 1976) should be read as "may". *See,* Petitioners' Brief at 19. Even if this Court were to accept this argument the analysis and result would not change. § 83-1,114 is very similar in structure and content to Nebraska's sentencing statute, *Neb. Rev. Stat.* § 29-2260 (Reissue 1976) which provides in part:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony, the court *may* withhold sentence of imprisonment unless . . . the court finds that imprisonment is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

There follows, a listing of 11 factors, many of which are objective, which the court must consider. Thus, although addressed to different yet analagous process (*See,* n. 13 and 24, *infra.*), the two statutes are almost identical excepting the use of the word "may" in the sentencing statute. Yet, this Court has held that

recting the Board, the interest is "more than an abstract need or desire . . ., more than a unilaterial expectation" of release. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); it is an expectancy that "has real substance"; *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 577; *cf. Goss* v. *Lopez*, 419 U.S. 565, 576 (1975).[12]

In addition to this precise statutory framework giving rise to a protected liberty interest, the nature and function of parole in a state's correctional system reinforces an inmate's entitlement to parole. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), the Chief Justice recognized that parole is an integral part of the penological system.

> Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined to the full term of the sentence imposed. It also serves to alleviate the cost to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of his sentence.

Id. at 477. (footnotes omitted). Even more important, however, is the recognition that "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?*, 38 Fed. Prob. 42, 47 (June 1975). In President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967), the Commission concluded:

> [T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence . . . parole legislation involves essentially a delegation of sentencing power to parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision.

In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole Release Decisions*, 60 Cal. L. Rev. 1518, 1534 (1972).[13]

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the Due Process Clause applies to sentencing, e.g., *Gardner* v. *Florida*, 430 U.S. 349 (1977), as has the State of Nebraska, *State* v. *Richter*, 191 Neb. 34, 214 N.W.2d 16 (1973). The United States analysis apparently would not change since, even accepting the Board's reading of "shall" as "may", it has stated that specification of "particular facts that govern the release decision", as in § 83-1,114(2) (Reissue 1976), would trigger due process protections. Amicus Brief of U.S. at 32.

[12] The inmates agree with the Amicus Brief of the United States that the Nebraska statute gives rise to a liberty interest in parole since a presumption in favor of parole is created giving a Nebraska inmate a legitimate entitlement to release on parole, subject to defeasance only if the parole authorities find one or more of a limited number of grounds for denial are present. *See*, Amicus Brief of U.S. at 35. The Inmates, however, feel this presumption is not created by the particular words of the statute but rather this presumption is created by the existence of the right to parole under a state's correctional system regardless of whether it is a mandatory or permissive system. *See*, I.B. of Brief, *infra*.

[13] See n.24, *infra*, for a discussion of the impact of this similarity between parole and sentencing upon the question of the procedures which are due.

With the recognition of the importance of parole in the criminal process by society, judges, and this Court, it is of the utomost importance that this Court now recognize that the denial of parole is the deprivation of liberty within the meaning of the Due Process Clause.

Where, as here, a statute creates a liberty interest in the parole release decision, this Court's decisions in *Meachum* v. *Fano,* 427 U.S. 215 (1976) and *Montanye* v. *Haymes,* 427 U.S. 236 (1976) do not alter the conclusion that the Due Process Clause applies. Reliance thereon, *see,* Petitioners' Brief at 25, is therefore misplaced since both cases are quite distinguishable.

Both *Meachum* v. *Fano, supra,* and *Montanye* v. *Haymes, supra,* were prison transfer cases. Obviously, the interests involved there are quite distinguishable from those involved in the parole release decision. A transfer from one prison to another is much different than a transfer from a prison to the outside world. Certainly, both involve a change of environment, but the former involves only the place of incarceration, while the later involves conditional liberty. To rely upon these cases would be to look to the "weight" and not the "nature" of the interest at stake. *Board of Regents* v. *Roth, supra,* 408 U.S. at 570-571.

More importantly, in the transfer cases there was no statutory limitation on the discretion of the institution to be enforced. In *Meachum,* the Court found that "it is too ephemeral and insubstantial to trigger

procedural due process protections as long as prison officials have discretion to transfer [the prisoner] for whatever reason or for no reason at all." Id. at 228. Similarly, in *Montanye,* the Court stated:

> We held in *Meachum* v. *Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, *absent some right or some justifiable expectation rooted in state law* that he will not be transferred except for misbehavior or upon the occurrence of other specified events.

Montanye v. *Haynes, supra,* 427 U.S. at 242 (emphasis added).

Quite the opposite is present here. The Board's discretion is limited by state law, and the prisoner does have a right and justifiable expectation rooted in state law to a release on parole.

B. The Presence Of Discretion In The Parole Release Process Does Not Require A Conclusion That Due Process Should Not Apply.

The Board suggests that in order for an inmate to have a right which gives rise to procedural due process, the denial of a right must be conditioned upon findings of specific facts as opposed to subjective conclusions; and, since the Board's decision is not based upon specific findings of fact but rather subjective

determinations, due process is inappropriate. *See* Petitioner's Brief at 21. Granted, the decision of the Board is in large part discretionary and requires subjective expertise on the part of the Board. This does not, however, remove the determination from the coverage of the Due Process Clause, rather it increases the need for minimum procedural protection. Again, reference to the Court's discussion in *Morrissey* is appropriate. There, the Chief Justice recognized that the decision to revoke parole was not only based upon the factual determination of whether the parolee violated parole, but was also based on a determination by the parole board of whether the parolee should be recommitted to prison or whether other steps should be taken to protect society and improve chances of rehabilitation. Chief Justice Burger stated:

> The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. *Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.*

Morrissey v. *Brewer*, 408 U.S. 471, 480 (1972) (emphasis added).

It is not possible to distinguish a decision of the Board in a parole release proceeding from a decision to revoke parole. Both involve a prediction by the Board of the risk an individual will pose to society and the readiness of the community to accept or to continue to accept the individual within its fold. Just as the Board's decision regarding revocation is based not only on objective determinations of facts but also upon non-factual predictions and discretion, so too is the Board's determination of whether to grant or deny parole based on objective facts and subjective concerns. Moreover, NEB. REV. STAT. § 83-1,114(2) (Reissue 1976), requires the Board to take into account 14 factors in making its determination regarding release on parole. Factors such as the "offender's intelligence and training"; "the offender's past use of narcotics, or past habitual and excessive use of alcohol"; "the offender's family status"; or, "the type of residence, neighborhood or community in which the offender plans to live"; etc., all involve objective facts. The minimum requirements of due process will insure that these factors are accurately and correctly made available for the Board.

The Board's decision conclusively determines whether the inmate will be granted conditional liberty or forced to continue his present incarceration. An inmate's liberty interest, therefore, could be unjustifiably denied because of incorrect information or because of an erroneous evaluation of these factors, resulting in the inmate being "condemned to suffer

grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). It would be a grievous loss indeed for a prisoner, by reason of essentially an ex parte proceeding and the associated increased risk of error, to be denied parole and required to serve more of his term because the Board relied on data that was erroneous or because the attention of the Board was not called to data tending to indicate that parole should be granted, or for some other mistake regarding the 14 factors enumerated in the Nebraska statute. *See Bradford* v. *Weinstein*, *supra*, 519 F.2d at 732. Where the Board is to take into account numerous objective factual considerations in reaching a discretionary decision, the requirements of due process must be afforded.

Nevertheless, the Board suggests that where the administrative action is not conditioned on factual determinations, but rather on the prison officials' complete discretion, the requirements of due process are inappropriate. *See* Petitioners' Brief et 25. *Morrissey* openly rejected the argument now raised by Petitioners.

> Nor are we pursuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion.

Id., 408 U.S. at 483.

The Board next argues that the detailed factors to be taken into account under NEB. REV. STAT. § 83-1,114 (Reissue 1976), are simply a reflection of the legislature's awareness that a grant of authority to the Board in its unfettered discretion might not pass muster in the Nebraska Supreme Court, and thus, the factors are simply instructions to the Board as to the factors it is to take into account in reaching its decision. *See,* Petitioners' Brief at 18, 19. Even if this is an accurate articulation of the legislative intent, this discretionary authority does not mean the parole board can act arbitrarily. In *Kent* v. *United States*, 383 U.S. 541 (1966), this Court reviewed the discretion conferred upon the juvenile court system, stating:

> The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the juvenile court to determine in isolation and without participation for any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.

Id. at 533.

Although the Nebraska statute may give the Board a substantial amount of discretion as to the factual considerations to be evaluated, the weight to be given them, and the conclusion reached, the statute does

not confer upon the Board a license for arbitrary procedure. The Due Process Clause does not permit the Board to determine without minimum procedures the "critically" important question whether an inmate will be denied liberty.

It is even more important, however, that this Court recognize that to suggest an inmate does not have a liberty interest in a parole release proceeding where the decision is completely discretionary is to suggest there is no right to parole only a privilege. It is particularly appropriate to analyze the Board's argument in light of cases where this Court applied the right versus privilege doctrine to demonstrate that it is the same distinction, merely phrased differently. In *Barsky* v. *Board of Regents of University,* 347 U.S. 442 (1954), this Court held the State of New York could suspend a physician's license without complying with the procedural requirements of the Fourteenth Amendment because of the physician's conviction in federal court of a misdemeanor for failing to produce subpeonaed papers before a congressional committee. Mr. Justice Frankfurter, dissenting, pointed out the problems with such an unfettered control of discretion inherent in the right versus privilege distinction:

> It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on artibrary, whimsical or irrational considerations. A license cannot be revoked because a man is red-headed or because he was divorced, except for a calling, if such there be, for which red-headedness or an unbroken marriage may have some rational bearing. If a State licensing agency lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids.

Id. at 470, (Frankfurter, J., dissenting) (footnotes omitted).

The United States' and the Board's argument is that an inmate has no constitutional right to due process of law since he has no protected liberty interests when the decision is completely discretionary, the state having a right to grant or deny parole for any reason or no reason at all. This analysis of the state's discretionary power to grant or deny parole can be paralleled with the Supreme Court's holding in *Barsky.* That is, a physician has no constitutional right to due process of law since the state's decision to revoke that privilege is totally discretionary; it may deny a person the right to be a doctor for any reason or no reason at all.

The argument seems to be that in a parole revocation proceeding the individual has a right not to be

restrained, whereas in the parole release decision the interest is a privilege of release from restraint. This historical dichotomy of protection depending upon whether something is a right or a privilege has in more recent times been openly and repeatedly rejected by this Court. See *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564, 571 (1972). The test this Court has consistently applied since the rejection of that doctrine is based rather on the nature of the interest involved. *Board of Regents* v. *Roth, supra* at 570-71. Since *Morrissey* v. *Brewer,* parole has been considered conditional liberty representing an interest entitled to due process protection. An inmate's interest in the parole board's decision to grant or deny parole must be treated the same. "To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis." *United States ex rel. Johnson* v. *Chairman, N.Y. State Bd. of Parole,* 500 F.2d 925, 928 (2nd Cir. 1974). Whether the immedate issue is release or revocation, the stakes are the same: conditional liberty versus incarceration. The purpose of the minimum procedures of the Due Process Clause is to insure that this decision will not be made arbitrarily or erroneously.

The Board finally attempts to distinguish the denial of parole from parole revocation by suggesting that the Due Process Clause applies only when there is an adverse change in a condition as opposed to a continuation of a condition. *See,* Petitioners' Brief at 14-16. This Court, however, on numerous occasions

has held that an individual is entitled to a fair determination of a protected interest even where the individual does not presently enjoy that right. *E.g., Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963), *Konigsberg* v. *State Bar,* 353 U.S. 252 (1957), and *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) (admission to the Bar); *Speiser* v. *Randall,* 357 U.S. 513 (1958) (application for tax ememption); *Simmons* v. *United States,* 348 U.S. 397 (1955) (application for draft exemption); *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117 (1926) (application for admission to practice before Board of Tax Appeals). *See also Pence* v. *Kleppe,* 529 F.2d 135 (9th Cir. 1976) (Indian's application for land grant) and *Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir. 1964) (application for a liquor license). The inmate's interest in the parole decision must likewise be subject to the minimum procedures of due process to insure that there is a fair determination of the inmate's parole, and to insure that parole is not erroneously or arbitrarily denied.

C. Since The Parole Release Decision Affects An Inmate's Term Of Confinement, An Inmate Has A Liberty Interest In That Decision Even Where The State Statute Does Not Give Rise To A Presumption Of Release.

Under the present Nebraska statutory scheme creating the inmate's interest in parole, an inmate has a protected liberty interest because the Board's discretion is limited by the legislative criteria in determin-

ing whether to grant or deny parole. Complete reliance, however, on the language of the Nebraska statute utilized in setting forth the statutory scheme for parole is inappropriate and unacceptable for two reasons. First, if as the Board has suggested the Nebraska statute does not condition denial of parole based upon any factual determinations but solely on the subjective determination of the board as to the propriety of giving the particular inmate a parole, the parole system in Nebraska is not different from that in any other state where a parole board is given discretionary authority to grant or deny parole. Second, and more important, if this Court's decision is based upon the fact that the Nebraska statute creates a statutory presumption in favor of parole, Nebraska may avoid any constitutional procedural requirements by amending its statutes to eliminate the presumption in favor of release. *See,* Amicus Brief of U.S. at 37 n. 19; Petitioners' Brief at 18. It is therefore necessary to determine whether an inmate has a protected liberty interest in a parole board's decision to grant or deny parole where that decision is completely discretionary.

The United States in its Amicus Brief suggests that where there is not statutory presumption and no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. *See,* Amicus Brief of U.S.

at 30. The United States cites as authority Mr. Justice White's concurring and dissenting opinion in *Arnett* v. *Kennedy,* 416 U.S. 134, 181 (1974), wherein he stated:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided . . . no conditions at all, . . no hearing is required.

Reliance upon this language in the context of a liberty interest is, however, unfounded. As Mr. Justice White stated in *Arnett* v. *Kennedy, supra* at 178 n. 6:

> My views as to the requirments of due process where property interests are at stake does not deal with the entirely separate matter and requirements of due process when a person is deprived of liberty.

Additionally, the Board, California and Oklahoma suggest that since the inmates interest in the Board's decision to grant or deny parole is but a mere expectation or hope of achieving a protected status it is not a liberty interest within the meaning of the Due Process Clause. The logic of these arguments depend upon one basic assumption. That is, this Court must assume that an inmate's interest in the parole decision is either a property interest or assume that the analysis of liberty within the Due Process Clause is the same as the analysis of a property interest. Granted, the source of liberty like a property interest may be created by state law. *Wolff* v. *McDonnell, supra,* and

at times "the analysis as to liberty parallels the accepted due process analysis as to property." *Id.*, 418 U.S. at 557. Liberty, however, within the meaning of the Due Process Clause is separate from the meaning of property. *Arnett* v. *Kennedy,* 416 U.S. 134, 178 n. 6 (1974) (White, J., concurring in part and dissenting in part).

The question is not whether the inmates interest is a property interest, but rather the question is whether an inmate has a liberty interest in a parole release proceeding where the decision is completely discretionary with the Board; thus, the analysis regarding property interests is inappropriate. In defining property interests this Court has used such language as "entitlements"; "more than an abstract need or desire"; "more than a unilateral expectation"; an individual in order to have a property interest must instead have "a legitimate claim of entitlement to it." *Board of Regents* v. *Roth, supra,* 408 U.S. at 577. When dealing with property interests, it is necessary to undertake such an analysis. However, since there is still a fundamental distinction between an individual's liberty and an individual's interest in property, the inmate's interest must be viewed in light of a liberty definition.

The definition of liberty for the purpose of the Due Process Clause can be found not only in statutorily defined rights, but also in the accepted definitions of liberty. Without a doubt, liberty denotes immediate freedom from bodily restraint. *Meyer* v. *Nebraska,*

262 U.S. 390, 399 (1923). Since parole is freedom from physical restraint, parole has been considered a protected liberty within the meaning of the Due Process Clause. *See Morrissey* v. *Brewer,* 408 U.S. 471 (1972). Because the Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property without due process of law, Nebraska may not deny an inmate this liberty interest without due process of law.

The liberty interest at stake in the parole release decision is immediate conditional freedom. Whether that interest is based upon a decision stemming from a factual finding of designated legislative criteria or whether that decision is based upon completely subjective discretionary determinations by the Board, the interest is still the same. It is this underlying interest which determines whether Due Process applies and not the underlying function of the administrative proceeding.

The underlying liberty interest in the parole release decision is made clear in comparing the decisions of *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), and *Meachum* v. *Fano,* 427 U.S. 215 (1976). Under the particular state statute in *Wolff,* there were two kinds of punishment for flagrant or serious misconduct.

> The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disci-

> plinary cell, involves alteration of the conditions of confinement.

Id., 418 U.S. at 547.

In determining whether due process applied this Court distinguished between a decision involving an inmate's term of confinement as opposed to a decision involving the conditions of confinement. This distinction was clearly made in *Meachum* v. *Fano* where this Court held that a prison transfer proceeding was not subject to due process requirements even though the prison transfer adversely affected an inmate's conditions of confinement.

The decision to grant parole does not deal with a decision involving the conditions of confinement but deals rather with a determination of the term of confinement. While the effect of the Board's decision on the inmate's term of confinement is not as immediate as in a parole revocation proceeding, it is certainly more immediate than the effect of the decision to revoke good-time credits. This Court, in determining the extent of the minimum procedures required under the Due Process Clause in revoking good-time credits in *Wolff*, compared the effect of parole revocation to the denial of good-time credits on an inmate's term of confinement.

> Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless "inflicts a 'grievous loss' on the parolee and often on others." *Morrissey, Id.*, at 482, 92 S.Ct. at

> 2601. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance.

Wolff v. *McDonnell*, 418 U.S. at 560-561.

Similarly denying parole will not work any immediate change in the conditions of the inmate's liberty but will only continue his present incarceration; and thus, the effect on the inmate's interest is not as serious as the revocation of parole. Nevertheless, the effect on the term of confinement in a parole release proceeding is much more immediate than the effect on the term of confinement in revoking good-time credits. Parole is an immediate release and a conditional termination of the term of confinement as op-

posed to a possible earlier future release. Moreover, the revocation of good-time credits does not work any change in the condition of liberty, whereas parole involves a complete change in the conditions of liberty. Therefore, since the interest at stake is the inmate's conditional liberty, the need for the minimum procedures of due process in a parole release proceeding is even stronger than in *Wolff* v. *McDonnell, supra,* and must be afforded.

II. DUE PROCESS REQUIRES AT A MINIMUM NOTICE, A MEANINGFUL HEARING, A RECORD OF THAT HEARING, AND A STATEMENT OF REASONS FOR DENIAL.

Once it is determined that due process applies to the parole release decision, the question remains: how much process is due. *Morrissey* v. *Brewer, supra,* 408 U.S. at 481. The determination of this issue will depend on the competing interests involved, and on the particular statutory scheme adopted by the Nebraska legislature. It is necessary to consider the Nebras. a statutory scheme in determining what process is due since the State of Nebraska has defined the liberty guaranteed. The Constitution, on the other hand, defines the procedures which must be complied with in making that decision. See *Arnett* v. *Kennedy,* 416 U.S. 134, 185 (1974) (White, J., concurring in part and dissenting in part).

The minimum procedures required by the Due Process Clause must depend upon the circumstances sur-

rounding the parole release proceeding and the particular demands of such a system.[14] There are several competing interests which must be considered in formulating the standards which are applicable. As this Court noted in *Mathews* v. *Eldridge,* 424 U.S. 319, 334-335 (1976):

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d. 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d. 484 (1972). Accordingly, resolution of the issue . . . requires analysis of the governmental and private interests that are affected. *Arnett* v. *Kennedy, supra,* 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); *Goldberg* v. *Kelly, supra,* 397 U.S. at 263-266, 90 S.Ct., at 1018-1020; *Cafeteria* v. *McElroy, supra,* 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private inter-

[14] The Inmates have not attempted to identify and rely upon any specific decision of this Court as providing the model for identifying the elements of due process applicable hereto. Each case must be examined on its own factual basis and the requirements of due process molded to fit the specific facts presented. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). However, bacause of the near identity of interests at stake, the Inmates would submit that the present case is most closely analogous to *Morrissey* v. *Brewer,* 408 U.S. 471 (19729.

> est that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See e.g., Goldberg* v. *Kelly, supra,* 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

It is important, therefore, to initially consider the overall importance of the parole decision to an inmate and contrast this with the government's interests. It is generally accepted that the two main goals of a parole board's decision, whether it be the decision to revoke parole or the decision to grant parole in the first instance, are to predict accurately the risks a person will pose to society, and to forecast the ability of the community to provide an acceptable environment for the prisoner. *See, Morrissey Brewer, supra,* 408 U.S. at 480. An inmate's interests in insuring that this determination is not erroneously made or based upon mistaken information is enormous. At stake for the inmate is conditional liberty. He has an interest in the release decision being made on the basis of accurate data.[15] He has an interest in being free from an arbitrary decision. He has an interest in

[15] Instances of inaccurate information contained in an inmate's file are not uncommon. *cf. Franklin* v. *Shields,* 399 F. Supp. 309, 313 (W.D. Va. 1975), affirmed in part, reversed in part, 569 F.2d 784 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978) (finding of fact that Virginia Parole Board relies on factually

> not having the decision influenced by irrational, inconsistent or impermissible criteria.

erroneous information never verified by the Board); *Kohlman* v. *Norton,* 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard* v. *Mississippi State Probation and Parole Board,* 373 F. Supp. 699 (N.D. Miss. 1974), reversed, 509 F.2d 820 (1975), cert. denied, 423 U.S. 998 (1975) (prisoner denied parole on the basis of illegal disciplinary action); *Masiello* v. *Norton,* 364 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation, that petitioner would ally with father if released, insufficient basis for parole denial); *In re Rodriguez,* 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (file material, later proven in error, led parole officers to believe that prisoner, a nonviolent sex offender, had violent tendencies. 14 Cal.3d at 648 n.14; parole evaluation asserted that "family rejects him," when in fact prisoner had a home and employment in family business waiting for him. *Id.* at 651 n.16); *State* v. *Pohlabel,* 61 *N.J. Super.* 242, 160 A.2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); A. Bruce, A. Harno, E. Burgess, J. Landesco, *The Workings of the Indeterminate-Sentence Law and the Parole System in Illinois* 77 (1928) (parole board files inconsistent, ambigous, and incomplete); D. Dressler, *Practice and Theory of Probation and Parole* 115-16 (2d ed. 1969) (files often contain incomplete and erroneous information); Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, 88, 91 (1974) (denial of parole, because of failure to utilize educational programs, by board member unaware that no such programs then existed at unit to which prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); Final Report of the Joint Committee on Prison Reform of the Texas Legislature 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to his files"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 2d. Sess. at 451 (1972) (testimony of Dr. Willard Gaylin) ("I have seen black men listed as white and Harvard graduates listed with borderline IQ's");

It is equally clear that the government also has an interest in the parole release decision. Its interest, however, is not only limited to the increased administrative burdens that may result or the maintenance of an efificient administration of the parole system. In light of the two main goals of parole, the state along with society in general has an interest in insuring that the parole decision is not arbitrarily made and is based upon all available data. The role of parole in the criminal justice system and the rehabilitation process requires that the integrity of the parole decision be maintained through a just, reasonable and procedurally fair process. In short:

> [b]oth the . . . [prospective] parolee and the State have interest in the accurate finding of fact and the informed use of discretion—the . . . [prospective] parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

Gagnon v. *Scarpelli*, 411 U.S.778, 785 (1973).

The primary interest that the Board can legitimately assert in opposition to the suggested due process requirements is the increased administrative burden that might result. This Court, however, has previously placed such contentions in their proper perspective. In *Breed* v. *Jones*, 421 U.S. 519 (1975),

the Court readily acknowledged "that the flexibility and informality of juvenile proceedings are diminished by the application of due process standards", but replied: "Due process standards inevitably produce such an effect, but that tells us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions." *Id.* at 535 n. 15. And in *Gagnon* v. *Scarpelli, supra*, the Court recognized that "[s]ome amount of disruption inevitable attends any new constitutional ruling." 411 U.S. at 782 n. 5. This Court has reiterated on a number of occasions that 'the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 404 U.S. 645, 656 (1972); *See, Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973); *Bell* v. *Burson*, 402 U.S. 535, 540-41 (1971).

With the foregoing discussion in mind, it is appropriate to state the nature of the safeguards the Inmates contend are minimally mandated by the Due Process Clause, recognizing 'that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer, supra*, 408 U.S. at 481. Obviously, the full panoply of rights afforded in a criminal proceeding is not appropriate or necessary in parole release proceedings. *See, e.g., Franklin* v. *Shields*, 569 F.2d 784, 800 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978); *Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. (1975). *See also Wolff* v. *McDonnell, supra*, 418 U.S. at 556; *Morrissey* v. *Brewer, supra*, 408 U.S. at 482 n. 8. Rather, weighing

the interests invloved, the Inmates submit that it is necessary to select only those due process safeguards designed to insure the prisoner a meaningful opportunity to be heard and to know and rebut factual information upon which an adverse decision may be predicated; to apprise the prosepective parolee of the reasons and essential factual base for an adverse decision; and to preclude the possibility of arbitrary decision making by the Board. To achieve these ends, the Inmates urge that the following procedures be adopted by the Court as those required in parole release proceedings:[16]

(1) Every inmate who is eligible for parole under Nebraska law must be afforded a hearing each time the parole decision is made at which the inmate is (a) entitled to appear; (b) permitted to present documentary evidence; (c) permitted, subject to prison security considerations, to call witnesses in his own behalf; and (d) allowed to hear adverse testimony and examine adverse factual information in the possession of the Board, or, if prision security considerations re-

[16] The Inmates originally requested the right to counsel in parole release proceedings (A.27), but have not pursued such claim because the Board presently permits leagal counsel to be present and assist inmates at parole hearings and because *Neb. Rev. Stat.* § 83-1,112(2) (Reissue 1976) guarantees inmates the right to advise with any persons of their choosing in preparing for a hearing before the Board. The Inmates submit, however, that absent such a statute and practice, they would be entitled to at least the assistance of an advocate as suggested in the *Amici* Brief of the plaintiff Class in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974).

quire, informed of any testimony received or factual information in the possession of the Board which might lead to an adverse decision.

(2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance thereof. This notice shall contain a list of the factors which may be considered by the Board in making its determination.

(3) A record of the proceedings which is capable of being reduced to writing must be maintained.

(4) Withing a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

A. Under The Nebraska Statutory Scheme, An Inmate Is Entitled To A Hearing Each Time The Parole Desision Is Made.

Without question, once it is determined that there is an interest protected by the Due Process Clause, a hearing is required. *See Wolff* v. *McDonnell*, 418 U.S. 539, 557-58 (1974). *See also, Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). The Eighth Circuit required at a minimum that a formal hearing be held only when the inmate first becomes eligible for parole with subsequent parole release hearings to be held only in the discretion of the Board. (A. 18, 23).

Since the inmate's liberty interest is affected each time the Board decides whether to grant or deny parole, the minimum requirements of due process, including that of a hearing, must attach each time the decision is made.[17] Under the Nebraska statutory scheme, since the state has procided that the decision to grant or deny parole is to be made once a year after a prisoner serves his minimum sentence, the minimum procedures of due process must be afforded once a year.[18]

[17] The Board suggests that the requirement of a due process hearing may result in undesirable judicial review of the actions of the Board. *See* Petitioner's Brief at 33. At the outset, it is important to point out that review may be obtainable by a Petition in Error to the state district court under the present system. *See, Neb. Rev. Stat.* § 25-1901 et. seq.(Reissue 1976). But even more important, the fact that a constitutionally required hearing may result in increased judicial review is not a pertinent consideration in determining either whether due process applies or what the minimum procedures will be. The Court has previously recognized that where fundamental constitutional rights are at stake in proceedings involving correctional institutitions such review may be appropriate. *Wolff* v. *McDonnell*, 418 U.S. 539, 565 (1974). In any event, the question of whether judicial review will be obtainable in either state or federal court is better decided at the time such a review is actually sought.

[18] The United States argues at pages 42-43 of its Brief that hearings at or near the date of inmate's initial eligibility for parole would be pointless and the 'Due Process Clause does not require the state to conduct a charade in these cases.'' The Board similarly argues at page 30 of its Brief that few inmates will be paroled as a result of the hearing who would not have been under present procedures. These arugment, however, miss the mark for several reasons. First, as previously shown the Nebraska legislature has seen fit to require such hearings. The wisdom of such

NEB. REV. STAT. § 83-1,111 (Reissue 1976), provides that an inmate is entitled to a parole release hearing within 60 days before the expiration of his minimum term less any reduction.[19] NEB. REV. STAT. § 83-1,111(4) (Reissue 1976) additionally provides that if the parole board defers the case for later consideration, or in effect denies parole for up to a year, *the inmate shall be afforded a parole hearing at least once a year until a release date is fixed.* In other words, it is clear that the parole release decision is to be made once a year and each time this decision is made, the minimum requirements of dueprocess must be afforded.[20] While it certainly is true that the minimum pro-

requirement is not here at issue. Second, it is pure speculation, without support in the record, to suggest that few if any additional inmates will be paroled as a result of the more thorough considerations the Inmates advocate herein. Third, both the Board and the United States ignore in this argument the beneficial effect, from a correctional standpoint, which such hearings will have. A hearing, even though resulting in a denial can assist in alleviating frustration on the part of the inmate and promote rehavilitative goals.

[19] Although the Nebraska statute clearly states that an inmate is entitled to a parole hearing, under the present practice of the parole board, it does not appear that in fact such a hearing is given. Rather a review hearing pursuant to *Neb. Rev. Stat.* § 83-192(9) (Reissue 1976), is frequently held in its place with only the possibility that a formal parole hearing will subsequently be held. *See,* Petitioners' Brief at 9.

[20] Again it appears that under the present practices of the parole board an inmate is not afforded a formal parole hearing each year. Instead the review hearing as authorized in *Neb. Rev. Stat.* § 83-192(9) (Reissue 1976) is used as a substitute for the parole hearing. *See,* A. 32 and petitioner's Brief at 9.

cedures of due process require an initial hearing, in light of the Nebraska legislative scheme requiring a decision each year, a hearing must be afforded each time this decision is made.[21]

In addition to these statutory requirements, NEB. REV. STAT. § 83-192 (Reissue 1976), sets out additional duties and functions of the Board. Along with the responsibility of determining the time of release on parole of a committed offender eligible for such re-

[21] There is no question that an inmate must be afforded a formal parole hearing at some point in the parole release process. Under Nebraska law, an annual hearing is required. Nebraska's required annual hearing is particularly appropriate in view of the fact that the release of an inmate on parole is upon the initiative of the Board of Parole, rather than upon application of the inmate. *Neb. Rev. Stat.* § 83-1,111(5) (Reissue 1976). In other states where the parole release process is invoked by application of the prisoner, the parole authority no doubt has an interest in circumscribing the ability of inmates to force repeated, but futile, parole hearings simply through the filing of new applications for parole. Perhaps the decision as to the frequency with which parole hearings should be held, absent statutory direction, should be left to another case or the Court may conclude that such states should be directed to hold periodic hearings, leaving to the discretion of the states the establishment of the frequency thereof, subject, however, to a requirement of reasonableness.

The United States acknowledges, *See* Amicus Brief of United States at 37 n.19, that under the law of most states and under federal law, inmates have a right to consideration for parole at a particular time, but asserts 'this case does not involve a contention that any person, otherwise eligible for parole, was denied consideration." Such assertion is obviously incorrect. The Inmates have and do content that there is a right to consideration annually and that the Board has effectively denied this right through its improper use of review hearings.

lease, NEB. REV. STAT. § 83-192(9) (Reissue 1976) provides that the Board shall review the record of every committed offender at least once a year. This review has been referred to herein as a "review hearing" and under the Nebraska scheme is completely independent of the parole release decision. This is evident by the fact that under NEB. REV. STAT. § 83-192(9) (Reissue 1976) the review hearing is afforded every inmate whether or not eligible for parole; and, the factors that are to be reviewed are specifically set out in that section. On the other hand, the factors for determining release on parole under NEB. REV. STAT. § 83-1,111 (Reissue 1976) are set out in NEB. REV. STAT. § 83-1,114 (Reissue 1976). Although some of the factors in § 83-1,114 are similar to § 83-192(9), the factors are listed separately and do include different and separate considerations. It appears, therefore, that the Nebraska Legislature anticipated that the review hearing was not to be used to replace the annual hearing specified in § 83-1,111(4).

Respondents are not suggesting that the minimum procedures of due process apply to the review hearing, if it is used for the purpose the legislature intended. The purpose and function of the review hearing is not to determine or deny parole, but serves an independent and important function in the rehabilitation process. However, if under the practices and procedures of the parole board, the review hearing is used by the parole board as a substitute for the parole hearing specified under NEB. REV. STAT. § 83-1,111(4) (Reissue

1976) then the review hearing takes on a different function.[22] If, pursuant to a review hearing, an inmate is deferred for up to a year, the review hearing has in effect become his parole hearing and he has then been denied conditional liberty for that year. Under these circumstances, the minimum procedures required by the Due Process Clause must be complied with to insure that the right of parole is not arbitrarily abrogated.[23]

B. An Inmates Right To A Meaningful Hearing Includes The Right To Be Present; To Present Documentary And Testimonial Evidence; And, To Be Advised Of And Permitted To Rebut Adverse Evidence.

It has been said: "Authorities on parole procedures regard well conducted hearings as vital to effective decision-making, in terms of expanding the information available to the Board as well as to their effect on offenders." President's Commission on Law En-

[22] The Board acknowledge that the reivew hearing is used by the parole board as a substitute for a formal parole hearing not only when an inmate initially becomes eligible for parole, but also to meet the requirements *Neb. Rev. Stat.* § 83-1,111(4). (Reissue 1976) *See,* Petitioner's Brief at 8, 9.

[23] Recognize, however, that if in the future the review hearing is used specifically to review an inmate's record then these procedures and requirements would not apply. It is only when the reivew hearing for eligible inmates is used by the Board as a substitute for the annual § 83-1,111(4) parole hearing and thus the procedure through which the parole release decision is made that the due process procedures apply.

forcement and Administration of Justice, *Task Force Report: Corrections* (1967). *See also* R. Dawson, *Sentencing* 253 (1969). It is necessary, therefore, to determine what would be a "well conducted" hearing in compliance with the Due Process Clause.[24]

In order for an inmate's right to a hearing to have any real purpose it must be more than a mere exercise in formality. The Eighth Circuit determined that an inmate had a constitutional right to appear in person before the Board and must be allowed to present documentary evidence, but an inmate is not entitled, in the absence of unusual circumstances, to call witness-

[24] The United States argues that the limits of due process here applicable should be determined by reference to the analogous process of sentencing a convicted offender. *See,* Amicus Brief of the United States at 40. The Inmates have agreed that there are, indeed many similarities, *see,* n.13, *supra* and accompanying text. But, such acknowledgement does not support the conclusion that the same procedures apply. The similarities involve the nature of the interest involved, and therefore support the conclusion that due process applies, this Court having held that due process must be accorded in sentencing proceedings, e.g. *Gardner* v. *Florida,* 430 U.S. 349 (1977), despite the discretionary aspects thereof. The type of procedures applicable cannot be determined through such a comparative analysis. Each case must, rather, be determined on its own facts. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). The sentencing process comes immediately after a criminal proceeding at which the full panoply of due process rights have been accorded. Many of the factors which the sentencing judge must consider will have come to the judge's attention through that process. *See, United States* v. *Grayson,* ____ U.S. ____, 98 S.Ct. 2610 (1978) (June 26, 1978). A parole board has no similar proceeding upon which to rely for much of its decision-making process. It is not, therefore, appropriate to suggest that the procedures required should be the same.

es in his behalf. (A. 20-21, 23) As the Petitioners suggest, the present Nebraska system does allow an inmate to appear in person and to present evidence in his behalf including the right to call witnesses during a parole hearing. *See,* Petitioner's Brief at 31. The Board, however, suggests this is not constitutionally mandated.

Far and away, the right of an inmate to be present and allowed to present evidence at a parole release hearing is the most important aspect of the parole release proceeding to the inmate *See, Wolff* v. *McDonnell, supra,* 418 U.S. at 566. Without a hearing at which the inmate is present, it would appear to the inmate that his liberty interest would be subject entirely to the whims, hunch or caprice of the Board. A hearing not only will allow the inmate to discuss fully with the Board what his deficiencies are, how he may improve, or the standards required of him, but will also lend credibility to the system and will eliminate the hopeless frustration of a prisoner who is simply told that his parole is denied without ever having the opportunity to voice his concerns. Without the right to appear in person and present evidence, the inmate will wonder without answer whether he could have brought some fact to the Board's attention which might have made a difference; or, wonder how his behavior and attitude could have changed. Finally, the right to be present at a hearing and present evidence will eliminate the fear of the inmate that there is nothing he can do that will make a difference in the outcome.

This Court should make clear, moreover, that a hearing in conformity with the Due Process Clause must be more than the *pro forma* ritual that occurs in many jurisdictions. In Nebraska, for example, the average length of a review hearing is five to ten minutes (R. 16, 43), hardly an adequate time period for the Board to canvass the multitude of factors the Board is required to consider in its decisionmaking. NEB. REV. STAT. § 83-1,114 (Reissue 1976). Although it would be unwise to fix a minimum time for parole release hearings, it is important for the Court to impress on parole boards that, for the hearing to be constitutionally adequate, it must be held "in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545 (1965). The essential need is to recognize that the burden of processing cases shouldered by the Board must be tempered by the prisoner's constitutional right to a meaningful hearing. If this change means a modification in the hearing practices of the Board (*e.g.,* use of hearing examiners) it will not be the first time that constitutional imperatives have affected—and ultimately benefitted—decisionmaking processes.[25] *E.g., Morrissey* v. *Brewer, supra.*

The Eighth Circuit held that in the absence of unusual circumstnaces, an inmate does not have a constitutional right to call witnesses in his behalf in a

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[25] The Board has attacked the Eighth Circuit's requirements of a formal hearing, in part, on the basis of the increased administrative burden which might result. *See* Petitioners' Brief at 32. It first claims that the number of hearings required will be sig-

formal parole hearing. (A. 21, 24) The disallowance of this procedure, however, is a departure from this Court's holding in *Wolff* v. *McDonnell*, 418 U.S. 539

nificantly increased. While the record does not specifically support any such contention, the Inmates acknowledge that the number of formal parole hearings would be increased. The Inmates see no reason, however, for an increase in total number of both formal parole hearings and review hearings conducted. True, if the Board continued its present practice of conducting a review hearing in each case, prior to a parole hearing, affirmance or expansion of the Eighth Circuit requirement would result in additional hearings. However, if the Board were to combine the two hearings for eligible inmates (rather than following its present practice of substituting the review hearing for the parole hearing), complying with the Due Process Clause at the single hearing, only longer hearings, not both longer and more hearings, would be involved. The Board conducted 1,645 review hearings and 327 parole hearings during the period of July 1, 1975 through June 30, 1976. (Pl. Ex. 3, p. 17, R. 3,3). Through a constitutionally adequate combined procedure, 327 review hearings could thus have been eliminated, and, of the total 1,645 review hearings, only those inmates who hearings, only those inmates who were eligible for parole would have been entitled to a constitutionally prescribed hearing whereas the Board could have continued its present practice of conducting an abbreviated hearing for inmates who are not eligible for parole.

The Board also suggests that significant administrative burden will result from the requirements imposed by the Eighth Circuit in that parole plans will necessarily be required to be prepared for inmates having no reasonable possibility of parole. The Inmates are confident that the District Court can, in its supervision of the Board's preparation of procedures consistent with this Court's opinion, balance the interests involved and arrive at a fair accommodation of the Inmates' interests and the Board's desire to prevent needless preparation of parole plans for inmates who are unlikely to receive favorable consideration by the Board. Perhaps, procedures could be adopted whereunder such parole plans will be prepared by institutional employees

(1974), the case upon which both the District Court and the Eighth Circuit modeled their due process requirements.[26] In that case this Court held that an in-

only for inmates having served a specified portion of their sentence, without disciplinary action having been taken against them, or, employing some other objective criteria for determining which inmates will receive assistance in the preparation of such a plan. If, in considering a prospective parolee for whom a plan has not been prepared under such guidelines, the Board should conclude that, but for the absence of an acceptable parole plan, the inmate would be granted parole, then such inmate can be specifically referred for preparation of a parole plan, the Board deferring final action on such inmate's case until receipt of the plan.

[26] The Eighth Circuit's conclusion that the calling of witnesses at parole hearings is not constitutionally required, absent unusual circumstances, may have been based upon considerations similar to those expressed by the United States concerning the "relationship between prisoner and jailer." *See* Amicus Brief of United States, p. 39. It should be remembered, however, that unlike *Wolff* v. *McDonnell*, where such concerns were also expressed, the nature of a parole hearing is not accusatorial in nature. Thus, the risk of confrontation between the "jailer" and prisoners is much less. Moreover, obviously, the interest at stake is much greater, that is, liberty in the immediate future versus liberty in the distant future. It should be further remembered that prisoners at parole hearings in Nebraska have the ability to call witnesses presently. (A. 33). Yet, the Board introduced no evidence showing any disruption to the prison environment as a result thereof. True, the hearings are held within the prison walls, but the concerns expressed by this Court previously do not appear to have presented Nebraska authorities with significant difficulties sufficient to justify restriction of the right to call witnesses at parole hearings. To the extent that such concerns are justifiable, the accommodation made by the District Court is much more defensible. That is, *subject to prison security considerations*, the inmate should be permitted to call witnesses in his own behalf. (Pet. App. 40).

mate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. *Id.* at 565-566. In other words, an inmate was to be allowed to call witnesses except in unusual circumstances, and if the reviewing board declined to allow a witness, this Court suggested that the board should state its reasons for refusing to call a witness. The Eighth Circuit on the other hand determined that the right to call a witness was the exception rather than the rule. The procedure outlined by this Court in *Wolff* should at a minimum control. An inmate has even more at stake in a parole release determination than in the prison disciplinary situation of *Wolff.* In *Wolff,* the inmate stood to lose a reduction in his sentence, or in other words a delayed release at some point in the future. In the instance case, a prospective parolee stands to gain immediate conditional liberty. Therefore, the Eighth Circuit's departure from the *Wolff* procedure was inappropriate.

This Court has previously stated that "[o]rdinarily, the right to present evidence is basic to a fair hearing," *Wolff* v. *McDonnell,* 418 U.S. at 566. An integral component of the right to a fair and meaningful hearing is the right to rebut adverse factual evidence. To be able to effectively do so, of course, the inmate must know what adverse factual evidence has been presented. Presently, Nebraska inmates are not permit-

ted to examine their prison files, and therefore are unaware of what inaccurate information therein contained may be considered by the Board in its determinations. (R. 19, 36, 46, 47, 56). Neither are the inmates permitted to hear any live testimony received by the Board in opposition to parole. (A. 33). To permit such practices to continue would, in large part, run the risk of rendering such hearings meaningless. While prison security considerations may require that the inmate not know the source of the factual information or testimony recieved, he is at least entitled to know the content of any testimony received and the nature of adverse information contained in his file. Certainly, the inmate is not entitled to relitigate past convictions, but to the extent erroneous information is contained in his file, he should be entitled to present to the Board a clarification or correction thereof.[27]

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[27] The Inmates have not heretofore requested advance access to their prison files in preparation for their hearing. They do not, therefore, formally ask this Court to grant this access. However, the Inmates do indicate their agreement with amicus briefs filed in their support which advocate advance access to and knowledge of the contents of prison files considered by the Parole Board. Such advance notice surely will assist the Board in making a fair determination based upon accurate information. Likewise, the Inmates do not here contend that there is a right to confrontation and cross examination, the finding that no such rights existed not having been appealed from the District Court to the Eighth Circuit. The Inmates' interest in knowing what adverse information is possessed by the Board or presented by other witnesses, is, however, viewed as fundamental and should, in order to permit rebuttal as opposed to confrontation, be made a part of the hearing requirement.

The Inmates agree, with the notable exception of the right to know what adverse testimony has been received or is in an inmate's file, that Nebraska complies with these constitutional requirements at a formal parole hearing. However, as was suggested earlier, the present practice of the parole board is to utilize a review hearing as a substitute for the annual parole hearing required under NEB. REV. STAT. § 83-1,111(4) (Reissue 1976). In a review hearing, although an inmate is allowed to be present, he is not allowed to present evidence. (A. 33). Therefore, where a review hearing is used to meet the requirements of a parole hearing pursuant to § 83-1,111(4), an inmate must be allowed the opportunity to present evidence to insure that all facts are brought to the Board's attention. Since a deferral pursuant to a review hearing is equivalent to a denial of parole at a parole hearing, both involve a denial of liberty and both must therefore meet the procedural safeguards.

C. Due Process Requires Reasonable Advance Notice Of The Hearing And A Listing Of The Criteria Governing The Board's Decision.

Under the present Nebraska system, an inmate is only notified of the month that his case will be set for hearing, whether it be a review or parole hearing. (A. 32). He is not notified of the exact day or hour of his hearing until the very day of the hearing. *Id.* The Eighth Circuit determined that due process entitled an inmate to receive reasonable written notice of the

date and hour for the hearing and under normal circumstances a minimum advanced notice of 72 hours would allow a prisoner a fair opportunity to prepare for his hearing. (A. 18-19, 23).[28]

The Board suggests that notice on the same day is sufficient notice since prisoners seldom go on vacation or have conflicting appointments. *See,* Petitioners' Brief at 30. One can only imagine the frustration of an inmate who, as a result of the limited notice, is unable to make a presentable personal appearance before the Board because of work or other conflicts. If an inmate is to be treated with any degree of dignity, it is insufficient to simply post a notice on the day of the hearing when that hearing may very well by one of the most important events in an inmate's life. Therefore, the present Nebraska procedure for giving notice is constitutionally deficient *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313-314 (1950). Requiring advance notice would not only allow a prisoner to organize and present his testimo-

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[28] The Inmates agrees that 72 hours advance notice is resonable under most circumstances if the Board continues its present practice of previously notifying the inmate of the month of his next hearing. However, if such practice were to be discontinued, 72 hours' advance notice in many cases would be inadequate to permit the inmate to properly prepare for the hearing. Continuance of the present practice of notifying the inmate of the month of his hearing far in advance should be continued as one of the procedures to be adopted by the Board under the District Court's supervision. In addition thereto, of course, the required written notice of the precise date and hour, normally not less than 72 hours in advance, would also apply.

ny, but also would lend credibility to the system by removing the *ad hoc* atmosphere that presently exists.

Along with this written notice requirement, the Eighth Circuit required that the notice be accompanied by a listing of the criteria governing the Board's parole decision. (A. 19-20, 23). Fundamental fairness mandates that an inmate have the opportunity to know and meet the criteria which may affect his decision when such a vital interest is at stake. In order to permit the inmate a reasonable opportunity to marshal facts in support of his conditional release, to clarify any adverse information which may exist in his file, and to rebut unfounded charges with possible mitigating circumstances, an inmate must be informed of the factors and criteria the board will or may take into account and know the standards to which he must conform if he is to be released. *See Franklin* v. *Shields*, 569 F.2d 784, 791-793 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978). The burden on the government is *de minimis* and it is not ludicrous to require that an inmate whose liberty is at stake be notified of what may or may not be a controlling factor in the Board's decision. "One can imagine nothing more cruel, inhuman, and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for relief." Davis, *Discretionary Justice* 132 (1969).

D. Due Process Of Law Requires That A Record, Capable Of Accurate Reduction To Writing, Be Maintained.

The Eight Circuit determined that a record which is capable of being reduced to writing is constitutionally mandated. (A. 21, 24). This requirement is an essential minimum safeguard to insure that the right of parole is not arbitrarily taken away. Only through some type of record will there be any assurance that the Board acted rationally rather than arbitrarily or, that the Board considered only relevant factors and not constitutionally impermissible criteria. As this Court noted in *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 565:

> Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, . . . the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or pros-

pect of prison disruption that can flow from the requirement of these statements.

While it is true that a tape recording is kept for both parole hearings and review hearings. (A. 33), unless a record is kept that is capable of being reduced to writing,[29] it would be difficult to determine whether the Board acted arbitrarily or relied upon constitutionally impermissible factors.

E. Due Process Of Law Requires A Full And Fair Written Explanation Of The Essential Facts Relied Upon And The Reasons For Denial.

As a final procedural requirement, the Eighth Circuit ordered that within a reasonable time following the hearing, an inmate who has been denied parole is to be given a full and fair written explanation of the essential facts relied upon and the reason for denial.[30]

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[29] The Inmates' concern in this respect is highlighted by the late-filed exhibits constituting the transcripts of the hearings of inmates James Love, Keith Christensen, Edward Steward and Merlin Scott Abbott, which collectively contained numerous examples of questions, answers or remarks by either Board members or the inmate involved being incapable of translation to written form. While the Inmates do not object to the use of tape recordings, rather than the use of a stenographer, they do strongly assert that the tape recordings utilized must be of sufficient quality to insure the capability of obtaining a verbatim written transcript at a later date.

[30] Every circuit which has held that the due process clause is applicable to parole release determinations has found that the parole board must inform the prisoner in writing of the reasons for denial of his application for parole. *See, Franklin* v. *Shields*, 569 F.2d 784 (4th Cir. 1977) (en banc) cert. denied, 435 U.S. 1003 (1978; *United States ex rel. Richerson* v. *Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); *Childs* v. *United States Board of Parole*, 511 F.2d 1970 (D.C. Cir. 1974); *United States ex rel. Johnson* v. *Chairman, N.Y. State Bd. of Parole*, 500 F.2d 925 (2nd Cir. 1974), *vacated as moot*, 419 U.S. 1015 (1975).

(A. 21-22, 24). It is particularly important with regard to this element to analyze the type of statement the Eighth Circuit considered appropriate to satisfy this requirement.

> We agree with the reasoning of the Second Circuit that for a statement of reasons to satisfy minimal due process requirements "detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based . . . ." *United States ex rel. Johnson* v. *Chairman, N.Y. State Bd. of Parole, supra*, 500 F.2d at 934. *See United States ex rel. Richerson* v. *Wolff, supra; Cooley* v. *Sigler, supra*, 381 F. Supp. at 443; *Candirini* v. *Attorney General*, 369 F. Supp. 1132, 1137 n.8 (E.D, N.Y. 1974). *Cf. Franklin* v. *Shields, supra*, 569 F.2d at 797-98 n. 59, 801.

(A. 22).

In other words, the Eighth Circuit indicated that in order to fulfill the requirement it would not be necessary to conduct an evidentiary or fact-finding hearing and then report the results to an inmate in

the form of a detailed finding of facts. What is necessary, however, is a statement of the reasons sufficient to show that the board did consider the relevant factors and made a rational decision as opposed to an arbitrary one.

The type of statement required by the Eighth Circuit must be viewed in terms of the purposes the statement would fulfill. That is, the Eighth Circuit felt that a statement would facilitate judicial review in those situations where it was allowed; it would promote thought by the board members and would compel them to cover the relevant points and escue irrelevancies; it would promote the goal of rehabilitation by relieving the frustrations of the inmates and instructing them on how they must improve their behavior and better their chances for relief; and finally, it would establish principles and precedents which would promote consistency by the Board.[31] (A. 22-23).

[31] The United States in its Amicus Brief at 46-47 n. 27, strongly criticizes these purposes that a written requirement would fulfill. What must be kept in mind, however, is that these procedural safeguards, like the other minimum requirements of due process, are imposed to protect the inmate from an arbitrary decision. In other words, the procedure is required to eliminate or reduce the possibility that an inmate might be erroneously deprived of his interest. Without a statement of reasons or a summary by the Board of the facts relied upon by it in reaching its conclusion, there is no assurance that the Board did in fact think, no assurance that the decision would be capable of efficient judicial review nor any assurance that the Board acted rationally. While it is true that the Constitution does not require the establishment of precedent, nor does the Constitution require state courts to have records more complete than the state courts believe necessary, what the Constitution does require is a decision which is procedurally fair and rationally reached; and, the requirement of a full and fair written explanation is a means to that end.

In addition to these purposes, the Inmates suggest that a requirement of a statement of reasons and essential facts relied upon would also provide an additional safeguard by preventing the possiblity that the Board relied upon constitutionally impermissible factors or unfounded and unsubstantiated factual conclusions in reaching its decision. *E.g. Wolff* v. *McDonnell, supra*, 418 U.S. at 565.

The present Nebraska system fulfills none of these purposes nor does it provide adequate safeguards against arbitrary decisions. An inmate is not advised of the essential facts relied upon (A. 34), and although they are in most cases informed of a reason for denial, they are told through the use of a standardized letter which in many cases give as a reason for denial "disciplinary report". (A. 45). To inform an inmate that he was denied parole simply because of a "disciplinary report" borders on meaningless. Only when the underlying evidentiary and factual circumstances are adequately summarized can the purposes behind such a requirement be achieved.

Even to a greater extent, the same deficiencies exist when an inmate is informed of the reasons why parole is being denied pursuant to a review hearing. (A. 40-45). A statement of reasons for denial consisting of "your continued correctional treatment, vocational,

educational, or job assignment in this facility will substantially enhance your capacity to lead a law-abiding life when released at a later date" should not be tolerated even under the limited requirement suggested by the Eighth Circuit.

CONCLUSION

For the foregoing reasons, Respondents request that the determination of the Court of Appeals that due process protection applies to parole release proceedings be affirmed. Respondents further request that in determining what procedures are due, the Court conclude that Nebraska, under its statutory provisions, must conduct formal parole hearings not less often than annually and that all such hearings the inmates must be afforded the right to be present, the right to present documentary and testimonial evidence, and the right to know and rebut any adverse factual information received or in the possession of the Nebraska Board of Parole. In all other respects, Respondents request that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

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Respondents.

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Constitutions

Statutes

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

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BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE STATE OF CALIFORNIA

The issues presented by the petitioners fairly comprehend the question of whether the Due Process Clause of the Fourteenth Amendment applies to administrative proceedings to consider the grant or denial of early release of state prisoners on parole.

More than 20,000 persons are incarcerated in California state prisons. The California Community Release Board will conduct approximately 9,600 parole consideration hearings during the 1978-79 fiscal year.

California presently conducts five variations of parole consideration proceedings depending on whether the inmate is under a life sentence, whether his offense was committed before July 1, 1977—the effective date of the new Determinate Sentence Law, and whether he had been granted a parole date under the old Indeterminate Sentence Law. These include serious offender hearings; non-life parole hearings; non-life progress review hearings; life parole hearings, and life progress review hearings.

For all types of parole granting proceedings, California inmates are entitled to review their file, with counsel if they wish, at least ten days before the hearing and are entitled to enter a written response to any material in the file. They receive advance notice of the date of the hearing and of the matters to be considered at the hearing. They are entitled to appear, to ask, to answer, and to have questions answered. They are entitled to speak on their own behalf, and to the presence of a staff person whose purpose it is to insure that all relevant facts are presented, including contradictory assertions of fact not resolved in other proceedings. They are entitled to an unbiased panel, and to challenge panel members for cause. They are entitled to a verbatim record of the proceedings, and to a reasoned written decision. Applicable standards and criteria for parole release and for determination of a release date are published public administrative regulations, adopted under the California Administrative Procedure Act and available to each inmate.

At serious offender hearings, and at life parole consideration hearings every inmate has an unconditional right to counsel, appointed if necessary, in addition to all of the above rights.

Notwithstanding the adoption of procedural features which far exceed the minimum requirements of due process applied by federal decisions in several jurisdictions, a determination by this Court that administrative parole consideration procedures implicate the Fourteenth Amendment could affect California in several important ways.

First, the validity of many thousands of parole release decisions could become clouded, and it may become necessary to adjust the procedures for future parole release proceedings.

Second, the range within which the state executive and the Legislature is able to fashion parole policy in California, and to adjust procedures and standards to implement such policy could be affected by this Court's decision.

Third, each parole consideration proceeding could, in effect, become a "federal case" and the parole consideration process could become burdened with persistent federal litigation initiated by inmates under the Civil Rights Act, Title 42 United States Code, section 1983, to establish additional procedural rights as well as to vindicate noncompliance with specified minimum requirements in particular cases. Such litigation is perceived by plaintiffs and by many courts as free of restraints from requirements of exhaustion of remedies, and is encouraged by the prospect of attorney's fees.

Fourth, the questions of whether and, if so, what process is due at parole release proceedings is now pending in a class action under 42 United States Code, section 1983, brought on behalf of all male felons in prison or on parole

in California. *VanGeldern v. Kerr,* C-72-2088 SAW (United States District Court, Northern District of California).[1] This action started November 1972, and was tried during July and August 1976, but has not yet been decided by the district court. The procedures persistently demanded in the *VanGeldern* case include the absolute right to counsel at all parole release proceedings; the right to call favorable witnesses, to subpoena witnesses, and to confront and cross-examine persons who have given information considered adverse to the inmate. That such litigation persists despite the broad procedural features already afforded in California warrants apprehension of a determination by this Court that due process applies.

In another case, the United States Court of Appeals for the Ninth Circuit has taken an inmate's appeal from denial of habeas corpus which appeal argues that a due process hearing must attend determination of an inmate's minimum eligible parole date. *Salas v. Sumner,* No. 77-3287, United States Court of Appeals for the Ninth Circuit, argued November 6, 1978.

The determination of the issues by this Court will afford guidance to the district court, and to the Court of Appeals, and will affect the positions of the parties in litigation of major statewide significance.

SUMMARY OF ARGUMENT

The putative weight of the private interest involved may not be considered in determining whether due process applies to state parole release proceedings. Only the nature of the interest may be considered. As a state prisoner has

[1]See *Kerr v. United States District Court,* 426 U.S. 394 (1976).

no independent federal right to any foreshortening of his lawful imprisonment, the nature of his interest in parole release must be determined from state law.

The Due Process Clause cannot be implicated by state administrative proceedings which do not jeopardize a person's liberty or property. Specifically, state prisoners who seek the imposition of minimum standards of due process on parole consideration proceedings must establish that state law has conferred a legitimate claim of entitlement to be released on parole, and that this entitlement is in jeopardy at the parole release proceeding. Where state law has not conferred a legitimate claim of entitlement in advance of the parole release hearing, the inmate harbors only a unilateral expectation not comparable to the nature of the private interest jeopardized at a parole revocation proceeding, or even at a parole rescission hearing, and not sufficient to implicate the Due Process Clause.

The decision of whether a lawful period of state imprisonment should be foreshortened by release on parole is a prerogative reserved by the Tenth Amendment. The decision necessarily involves a consideration of state societal interests—including protection of society, punishment, and deterrence. An intent to confer an entitlement to parole in advance of parole consideration hearings would effectively subordinate these interests to other interests, including an inmate's interest in abridgement of his lawful punishment. However necessary it may be to implication of the Due Process Clause, to impute such intent during federal litigation would abridge Tenth Amendment prerogatives unless the intent is expressed with unmistakable clarity in positive state law.

ARGUMENT

THE NATURE OF THE PRIVATE INTEREST AT PAROLE RELEASE PROCEEDINGS DOES NOT SUFFICE TO IMPLICATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Only the Nature of the Interest, and Not the Weight of the Interest May Be Considered.

In determining whether due process applies at all to state administrative parole release proceedings, the Court should confine itself to an appraisal of the nature of the inmate's interest which is at stake and should not consider the weight of the interest. *Board of Regents v. Roth,* 408 U.S. 564, 570-571 (1972). A determination that due process is applicable to a particular administrative proceeding is neither dependent upon, nor required by a finding of grievous loss. *Meachum v. Fano,* 427 U.S. 215, 224-225 (1976); *Moody v. Daggett,* 429 U.S. 78, 88 n. 9 (1976); *Walker v. Hughes,* 558 F.2d 1247, 1250-1251 (6th Cir. 1977).

The decisions below, as well as the decisions of a number of other federal courts, have focused on the putative weight of the inmate's interest, and have abridged prerogatives reserved under the Tenth Amendment in mistakingly characterizing the nature of the inmate's interest.

The Inmate's Interest Must Be A Legitimate Claim of Entitlement.

To invoke the Due Process Clause, the nature of the inmate's interest at parole consideration proceedings must be within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). This Court has indicated that a due process analysis of liberty interests parallels the

accepted due process analysis of property interests. *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974). In *Board of Regents v. Roth, supra,* the attributes of property interests which are protected by the Due Process Clause are described as follows:

> "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 557.

The touchstone of these interests cognizable under the Fourteenth Amendment is ". . . claim of entitlement," a phrase subsequently used by the court in *Moody v. Daggett, supra,* 429 U.S. at 88, n. 9. "Entitlement" has similarly been emphasized in this context in recent well-reasoned opinions of the United States Courts of Appeals for the Seventh Circuit and for the Sixth Circuit. *Solomon v. Benson,* 563 F.2d 339, 342 (7th Cir. 1977); *Walker v. Hughes, supra,* 558 F.2d 1247, 1250-1252 (6th Cir. 1977).

It is this distinction between unilateral expectation and legitimate claim of entitlement which separates the nature of the interest at stake at parole release from the nature of the interest at stake at parole revocation, or even at parole rescission hearings. But the Court of Appeals in this action stated:

> "The nature of the interest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration—and thus the Fourteenth Amendment applies to both. . . . . Since the protection of the due process clause extends to parolees, it may

not be denied to inmates." Opinion of the Court of Appeals, Appendix pages 7-8.[2]

At this point in its opinion the Court of Appeals describes activities which may be enjoyed by a parolee, as as well the interests of society in not having parole erroneously denied (App., p. 9). Though such statements may describe the weight of the inmate's interest, or an interest of society, they fall short of stating a basis for determining that the inmate enters the parole consideration hearing with a legitimate claim of entitlement to parole release.[3]

Entitlement to Parole Must Be Conferred by State Law.

As state prisoners have no independent federal constitutional or statutory right to a foreshortening of their lawful imprisonment by release on parole, resort must be had to state law to determine whether an inmate enters a parole hearing with a legitimate claim of entitlement to be released on parole. An intent to confer such an entitlement should not be imputed by a federal court unless it is expressed with unmistakable clarity in positive state law.

The establishment and implementation of a process for consideration of whether to foreshorten lawful imprisonment by granting parole is an exercise of legislative and executive prerogatives reserved to the states under the Tenth Amendment to the United States Constitution. In

[2]By appendix we refer to the brown covered single appendix filed in this Court in this action.

[3]The Court of Appeals' observation that society has an interest in not having parole release erroneously denied does not distinguish parole release from any other governmental decision, and does not advance analysis of whether the Due Process Clause is implicated.

fashioning a parole release process state governments take into account state policy and societal interests as well as expectations of inmates. Such societal interests include the protection of society, punishment, and deterrence. If state law is silent, or even ambiguous with respect to entitlement to parole release in advance of administrative parole release proceedings, federal courts should not attempt to fill the void by imputation of an intent to confer such entitlement.[4] To do so would abridge prerogatives reserved to the states under the Tenth Amendment by tipping the balance in favor of the putative interests or expectations of inmates although the state, in fashioning parole release proceedings, may well have perceived state policy in societal interests to be paramount.

In the instant case the Court of Appeals has read Nebraska Revised Statutes, section 83-1, 114 to confer on a state prisoner eligible for parole a right to be released on parole unless he is found unfit for reasons specified in the statute (Opinion of the Court of Appeals, Appendix, page 8). But the Attorney General has stated in the Brief of the Petitioners that this statute ". . . was not intended to vest any rights in the inmates to a parole, but was intended, instead, to constitute instructions to the Board of Parole as to the factors to be taken into account in reaching its decisions" (Brief of Petitioners, page 18). If, as the Nebraska Attorney General asserts, these statutory pro-

[4]Appropos is the observation of a district judge in a similar context: "Much as we would like to rule otherwise, under *Meachum v. Fano* [427 U.S. 215 (1976)], the statute's omission in creating a liberty expectancy to remain in one given juvenile institution compels us to decide that there is no such liberty interest at stake. There is no creation by omission." *Cruz* v. *Collazo*, 450 F.Supp. 235, 239 (D. Puerto Rico 1978).

visions are intended only as guidelines to the parole board, they should not also be taken as an inadvertent conferment upon inmates of an advance entitlement to parole release.

It is also noteworthy that the opinion of the Court of Appeals, in requiring that every inmate receive a formal parole hearing upon first becoming eligible for parole (App., p. 23), would supersede the practice of the Nebraska parole board to grant final or formal parole hearings only after an exercise of discretion at an earlier informal parole review hearing (Brief of Petitioners, page 9). If this practice has been valid under Nebraska law then the construction by the Court of Appeals of Nebraska Revised Statutes, section 83-1, 114 (App., p. 8) is incorrect, and the decision of the Court of Appeals to abolish parole review hearings is a clear abridgement of a state prerogative reserved under the Tenth Amendment.

For all of the above reasons we submit that the Due Process Clause of the Fourteenth Amendment should not be deemed implicated by state administrative parole release proceedings which involve only an inmate's expectation and not a legitimate claim of entitlement to parole release in advance of the hearing.

If Due Process Applies Only Rudimentary Process Should Be Due.

Mr. Justice Stevens' dissenting opinion in *Scott v. Kentucky State Board of Parole*, 429 U.S. 60, 61 n. 1 (1976), emphasizes that extensive litigation has developed in the federal courts, with varying results, not only about whether due process applies but also about what process is due.

A determination by this Court that due process applies would not reduce extensive federal litigation with varying results unless all the minimum requirements of due process are also specified. If due process is to apply at parole release proceedings, it should be restricted to some rudimentary form far short of that necessary in a criminal trial, or other adversary proceeding, and less also than the process due at parole revocation proceedings where the private interest at stake is greater and the administrative burdens are less. The administrative burdens at parole release proceedings, which occur inside prisons, are similar to the burdens recognized by the Court in *Wolff v. McDonnell, supra,* 418 U.S. 539, 560-563 (1974).

The differences between parole revocation and parole granting closely parallel the distinctions between dismissal of a student for failure to meet academic standards and dismissal for violation of valid rules of conduct which were recently before this Court in *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78, 86 n. 3 (1978):

> "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.[3]

"[3] . . . . We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment."

The nature of parole consideration is no less evaluative, and the interests of the states in preserving their present frameworks for evaluation of parole release are no less historically supported than the interests of the school in *Horowitz*.

CONCLUSION

The judgment of the court of appeals should be reversed and the matter should be remanded with directions that the action be dismissed because the Due Process Clause of the Fourteenth Amendment to the United States Constitution is not implicated by state administrative parole release proceedings.

Dated: November 16, 1978.

Respectfully submitted,

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Respondents.

BRIEF OF THE STATE OF OKLAHOMA AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

AUTHORITIES CONTINUED PAGE

Statutes

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-201

JOHN B. GREEHOLTZ, individually and as Chairman, Nebraska Board of Parole, EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE and EDWARD M. ROWLEY,
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BRIEF OF THE STATE OF OKLAHOMA AS AMICUS CURIAE

The Attorney General of Oklahoma, on behalf of the State of Oklahoma and pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States and Rule 29 of the Federal Rules of Civil Procedure, files its brief in the above styled case.

INTEREST OF AMICUS CURIAE

Oklahoma incarcerates individuals convicted of violating the criminal statutes of the State. Subsequent to conviction and incarceration, and prior to the expiration of their sentence, some of those individuals receive paroles from the Governor of Oklahoma on the recommendation of the State Pardon and Parole Board. This process has been the subject of litigation in the United States District Court for the Western District of Oklahoma. The plaintiffs were inmates in the Oklahoma correctional system and the defendants were the members of the Pardon and Parole Board and the Governor. The plaintiffs claimed a violation of their Fourteenth Amendment rights and particularly their right to due process of law as guaranteed by that Amendment. By agreement of the parties, the case was submitted on Motion for Summary Judgment. On April 24, 1978, the District Court entered an order granting judgment for the defendants. An appeal of that order is currently pending in the United States Court of Appeals for the Tenth Circuit,

ARGUMENT

When a challenge to the parole process of a state is predicated on a violation of the due process clause of the Fourteenth Amendment three questions are raised: (1) whether a "liberty interest" significant enough to be entitled to procedural protections, is involved;[1] (2) whether

[1] Because the denial of parole does not involve a deprivation of "life" or "property" only the "liberty" aspect of the Fourteenth Amendment need be discussd.

the deprivation of that interest resulted from state action, and (3) whether the deprivation occurred without the appropriate measure of due process of law required for the particular interest involved. The State of Oklahoma submits that an inmate in a state correctional system has no "liberty interest" at stake in a parole release hearing. Therefore, the last two questions raised above need not be considered.

The initial inquiry is then to determine whether or not a protected interest exists. United States Supreme Court cases defining "liberty interest" have not passed clearly on the issues raised in this appeal. (Compare the discussion of *Escoe* v. *Zerbst*, 295 U.S. 490 and *Jay* v. *Boyd*, 351 U.S. 345 in Footnote 3 at page 408 and of *Menechino* v. *Oswald*, 430 F.2d 403 [2nd Cir. 1970], *cert. den.* 400 U.S. 1023, 27 L.Ed.2d 635, 91 S.Ct. 558 [1971].) However, those cases are illustrative of the scope of interests encompassed by constitutional "liberty." As used in the Fourteenth Amendment, "liberty" is not subject to precise definition:

> "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Meyer v. *Nebraska*, 262 U.S. 390, 394, 67 L.Ed.2d 1042, 43 S.Ct. 625 (1922). As noted in *Meyer* v. *Nebraska*, supra, Fourteenth Amendment "liberty" means bodily restraint

as well as other specifically enumerated aspects of personal liberty. See, *Paul* v. *Davis*, 424 U.S. 693, 47 L.Ed. 2d 405, 96 S.Ct. 1155 (1976); *Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564, 33 L.E.2d 548, 92 S.Ct. 2701 (1972); *Griswald* v. *Connecticut*, 381 U.S. 479, 14 L. Ed.2d 510, 85 S.Ct. 1678 (1965); *Kent* v. *Dullus*, 357 U.S. 116, 2 L.Ed.2d 1204, 78 S.Ct. 1113 (1958); *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954). And it is well recognized that:

> "The range of interest protected by procedural due process is not infinite."

Board of Regents v. *Roth*, supra, at 408 U.S. 570.

However, in this case the Court is asked to extend the cases which have defined the scope of "liberty interest" to include an inmate's interest in the parole process. To determine the merits of this issue, it is necessary to examine the extent to which an inmate will suffer a "grievous loss" resulting from the denial of clemency. *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168, 95 L.Ed. 817, 71 S.Ct. 624 (1951) (Frankfurter J. concurring), quoted in *Goldberg* v. *Kelly*, 397 U.S. 254, 263, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970). It is not purely semantical to argue that an inmate has no liberty interest in parole because its denial results in no "loss," grievance or otherwise. Until paroled, the status of incarceration is not changed. Consequently, the inmate who has been previously deprived of his liberty with the

full panoply of procedural protections guaranteed by the Due Process Clause "loses" nothing, in the constitutional sense, when clemency is denied. *Brown* v. *Lundgren*, 528 F.2d 1050 (5th Cir. 1976); *Bradford* v. *Weinstein*, 519 F.2d 728 (4th Cir. 1974); *Scarpa* v. *United States Board of Parole*, 477 U.S. 278 (5th Cir. 1973); *Roach* v. *Board of Pardons and Paroles*, 503 F.2d 1367 (8th Cir. 1974); *Menechino* v. *Oswald*, 430 F.2d 403 (2nd Cir. 1970). To say that the inmate loses nothing is not to be flippant for certainly each inmate is affected by the decision. However, the United States Constitution does not provide for, nor discuss, parole and though a State is not obligated to provide paroles or other clemency, by doing so, the only constitutionally recognized interest conferred on an inmate prior to the actual decision to grant clemency is the right to be "considered" for parole in conformity with appropriate state statutes.[2] This is far different from a right to parole itself. *Williams* v. *Missouri Board of Probation and Parole*, No. 74-CV-125-W-2 (W.D. Mo. 1978), at page 13 of the Opinion. (Because the Constitution does not provide for parole, the source of any "liberty interest" must come from state law. *Wolff*, v. *McDonnell*, 418 U.S. 539, 556-557, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974); *Meachum* v. *Fano*, 427 U.S. 215, 225-228, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1976).)

It is, of course, misleading to characterize this argument as one founded on a right/privilege distinction. Oklahoma recognizes that the application of the due process

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[2] In Oklahoma, 57 O.S. 1971 § 332.7 requires that every inmate must be reviewed and considered for parole prior to the expiration of one-third of his sentence.

clause is not determined by resolution of this distinction. *Graham* v. *Richardson*, 403 U.S. 365, 374, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971). The foregoing is instead, an analysis of the "nature of the interest" at stake. *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). And the crucial element of this analysis is not merely the "weight" of an inmate's interest in release on parole but whether the nature of the interest is one within the contemplation of the "liberty" language of the Fourteenth Amendment. *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). *Morrissey* v. *Brewer*, supra, 408 U.S. at 481, 33 L.Ed.2d, at 494.

The distinction sought to be drawn by Oklahoma is between the status of an inmate granted clemency and the status of an inmate prior to a decision to grant clemency. The first is a recognizable, constitutionally protected interest to which due process attaches, *e.g.*, parole revocation — *Morrissey* v. *Brewer*, supra, and of good time credits — *Wolff* v. *McDonnell*, supra. The second constitutes a mere expectation or hope of achieving a protected status. Oklahoma submits that this distinction is valid and that nowhere in the Constitution or United States Supreme Court cases discussing "liberty" is an interest so ephemeral as this hope of a protected status recognized as a "liberty interest." Supporting this position is this Court's Opinion in *Morrissey* v. *Brewer*. In discussing the first status mentioned above, this Court wrote:

> "[t]hough the state properly subjects him [the parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison [Footnote 8]." 408 U.S. at 482

Footnote 8 reads as follows:

> "[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

U. S., ex rel. Bey v. *Connecticut Board of Parole*, 443 F.2d 1079, 1086 (C.A. 2 1971). Oklahoma submits that there can be no other significance for the distinction made in *Morrissey* v. *Brewer*, than to draw the line between when due process is applicable and when it is not.

In addition, in *Morrissey* this Court was faced with determining what procedural protections should attach to a fact-finding hearing, *i.e.*, did the inmate violate his parole. The parole process is clearly distinguishable because the Board cannot determine, as a matter of fact, whether or not an inmate will succeed as a parolee. Consequently, the procedures for insuring a fair fact-finding process are inappropriate where there is no fact capable of determination. (See *Williams* v. *Missouri Board of Probation and Parole*, supra.)

In addition to *Morrissey* v. *Brewer*, this Court's decision in *Moody* v. *Daggett*, 429 U.S. 78, 50 L.Ed.2d 236, 97 S.Ct. 274 (1976), is relevant to the issues raised in this case. In *Moody* v. *Daggett*, this Court held that a federal parolee imprisoned for a crime committed while on parole is not constitutionally entitled to a prompt parole revocation hearing when a parole violator warrant is issued and lodged with the institution in which he is confined but not executed and served on the inmate. At 50 L.Ed.2d 242,

the Court notes that issuance of the warrant is not revocation of the parole but that three options for disposition exist: (1) revoke parole after a hearing or (2) dismiss the warrant prior to hearing or (3) refuse to revoke parole after a hearing. Prior to execution of the warrant, there is no,

> "operative event triggering any loss of liberty attendant upon parole revocation. This is a functional distinction, for the loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant." *Moody* v. *Daggett*, supra, 50 L.Ed. 2d, at 244.

Oklahoma submits that the status of an inmate prior to a decision to grant clemency is identical to that of an inmate against whom a warrant has been lodged but not executed. Each has only the expectation of action which will affect his status of incarceration. In neither case is a liberty interest implicated.

> "With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which Morrissey sought to protect." *Moody* v. *Daggett*, supra, 50 L.Ed.2d, at 244.

This Court also shed light on the nature of a "liberty interest" in *Meachum* v. *Fano*, 427 U.S. 215, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1976), and *Montayne* v. *Haymes*, 427 U.S. 236, 49 L.Ed.2d 466, 96 S.Ct. 2543 (1976). In both cases the Court dealt with transfers of inmates between institutions within the state correctional system. At stake was the inmates' interest in being held in a less restrictive form of custody. The issue before the Court was whether

or not this constituted a "liberty interest" protected by the Fourteenth Amendment. This Court held in *Meachum* v. *Fano*:

> ". . . we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. . . . But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.
>
> "Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." 427 U.S. 224-225.

There is no question but that a parolee enjoys more freedom than an inmate incarcerated in one of the state's penal facilities. However, it is equally clear that a parolee

is in the custody of the state just as is an inmate incarcerated in a state penal facility. *Bricker* v. *Michigan Parole Board*, 405 F.Supp. 1340 (E.D. Mich. 1975); *Roach* v. *Board of Pardons and Paroles*, 503 F.2d 1367, 1368 (8th Cir. 1974). The only difference is the degree of custody involved. In Oklahoma, as in many states, the range of custody is from incarceration in the maximum security penitentiary to supervision while on parole. Though the range of custody is great, from very restricted to near freedom, this Court has held in *Meachum* and *Montayne* that the inmate has no "liberty interest" in serving his sentence under any particular degree of custody.

> "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons." 427 U.S. 224

And, Oklahoma would submit, the state is empowered to confine him for any period of time not to exceed the maximum lawful sentence under which he has been incarcerated. The analogy argued here by Oklahoma is supported in Footnote 8 of the Supreme Court's Opinion in *Meachum* v. *Fano*, supra.

In addition, it is clear that the *Meachum* and *Montayne* cases, supra, would apply to decisions involving the transfer of inmates to and from a community treatment work release center. Obviously, there is little difference between the liberty enjoyed by a parolee and that enjoyed by a resident of a community treatment center though the resident remains, technically, incarcerated. The significant difference is that the parolee enjoys a status protected by the Fourteenth Amendment which was created by state

statute and conferred on him by appropriate state parole authorities. It is clear that under *Meachum* and *Montayne* the community treatment center resident enjoys no such status.

However, it is argued that because the decision to grant parole shortens the period of incarceration that decision should also be protected by due process. Applying this reasoning to the above analogy a state would be required to comply with the Due Process Clause when deciding not to send a lawfully convicted inmate to a community treatment center as well as when deciding to send a community treatment center resident to another institution with a more restricted confinement.

It is interesting to apply this reasoning to another aspect of the criminal process. The decision to prosecute an alleged felon certainly affects that defendant's liberty and will likely result in his incarceration. However, it cannot be seriously argued that the prosecutor should comply with due process in deciding whether or not he will prosecute in a particular case. See, *Neuman* v. *United States*, 382 F.2d 479 (D.C. 1967).

CONCLUSION

Oklahoma contends that the interest of an inmate in release on parole does not constitute a liberty interest as that term is used in the Fourteenth Amendment. That provision provides that a state may not *deprive* an individual of liberty without providing due process. This case presents the opposite situation. When an inmate is first incarcerated, he has been deprived of all the liberty he will lose by

virtue of his conviction. However, nowhere in the Fourteenth Amendment is due process required when the state acts to give back a portion of that liberty of which the inmate has been lawfully deprived. Therefore, for the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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November, 1978

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA

I JOHN F. FISCHER II, depose and say that I am an attorney in the office of Larry Derryberry, attorney of record for the State of Oklahoma, Amicus Curiae herein, and that on November _____, 1978, pursuant to Rule 33, of the Rules of the Supreme Court, I served three copies of the foregoing brief, by mailing the copies in a duly addressed envelope, with First Class postage prepaid, to each of the following named counsel of record:

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All parties required to be served have been served.

_____
John F. Fischer II

Subscribed and sworn to before me on this _____ day of November, 1978.

_____
Notary Public

My commission expires _____.

No. 78-201

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN B. GREENHOLTZ, CHAIRMAN OF THE NEBRASKA BOARD OF PAROLE, ET AL., PETITIONERS

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

Cases: Page

Cases—Continued Page

Cases—Continued

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the procedural protections of the Due Process Clause apply to Nebraska's parole release proceedings.

2. Whether, if the Due Process Clause applies to parole release proceedings, the safeguards prescribed

by the court of appeals are required by the Constitution.

INTEREST OF THE UNITED STATES

This case involves the question whether and to what extent proceedings to determine whether a prisoner should be released on parole implicate the Due Process Clause. This Court's decision necessarily will affect the constitutional rules governing the operation of the federal parole system.

1. The United States maintains an extensive parole system. In fiscal year 1976, the most recent year for which figures are available, the United States Parole Commission made 10,228 final parole decisions concerning adult prisoners, granting parole in 4,429, or approximately 43 percent, of the cases. United States Board of Parole, *1973-1976 Annual Report* 22.

Under the provisions of the Parole Commission and Reorganization Act, 18 U.S.C. 4201-4218, and of the Commission's regulations (28 C.F.R. Part 2, 42 Fed. Reg. 39808), each prisoner is afforded numerous opportunities to participate in the process for deciding whether he should be released on parole. The Commission provides application forms to each eligible prisoner. The Commission holds an initial hearing and it attempts to set a presumptive release date or an effective parole date;[1] it gives the prisoner written

[1] The Commission usually sets a presumptive release date when the sentence is seven years or less. Because the Commission does not set a release date more than four years from the date of the hearing, it often does not set a presumptive release date when the sentences exceeds seven years. In those cases the Commission postpones parole consideration for four years and schedules another hearing.

notice of the time and place of the hearing; it gives the prisoner reasonable access to documents in his file; the prisoner is entitled to be represented at the hearing by a person of his choice. The prisoner or his representative may make a statement at the conclusion of the interview and provide information for the Commission's consideration.

The initial parole hearing is conducted by a panel of two examiners designated by the Commission. The panel informs the prisoner of its recommendation and, if it recommends the denial of parole, of its reasons. The initial decision is made by a regional Commissioner on the panel's recommendation.

The Commission has published a full explanation of the factors it considers in acting on applications for parole. These factors include the facts relating to his offense, his prior criminal record, his personal and social history and institutional experience, and his release plans. Objective guidelines indicate the customary range of time to be served before release for various combinations of these factors. If parole is denied, the prisoner is furnished with a "guideline evaluation statement," which sets forth the factors on which the Commission relied and shows the Commission's evaluation of those factors in the prisoner's case. The Commission may elect to parole a prisoner either before or after the time provided by the guidelines, and when it does so it provides an additional statement of reasons.

The prisoner may appeal an adverse initial decision to the regional Commissioner.[2] The appeal usually is handled on the record of the initial hearing, but attorneys, relatives and other interested parties may appear in the discretion of the Commissioner. The regional Commissioner's decision can be appealed to the National Appeals Board, whose decision is final.

2. Unless the Court should hold that the Due Process Clause not only applies to parole release decisions but also requires more elaborate procedures than those the court of appeals held to be "due," the Commission's procedures are unlikely to be directly affected by the outcome of this case. For the reasons that we discuss below, we believe that the procedural protections of the Due Process Clause apply to parole release proceedings only if the parole statute creates an entitlement to release from confinement absent specific findings of the inmate's unsuitability for release. In our view, the Nebraska statute at issue here creates such an entitlement, whereas the federal counterpart does not. Accordingly, the interest of the United States is to defend the prerogative of Congress to continue the present discretionary system of parole and to experiment with new procedures for parole determinations.

The Parole Commission and Reorganization Act illustrates the continuing process of experimentation, a process that is, in our view, vital to improvement of parole procedures. Many of the reforms embodied

[2] This amounts to asking the Commissioner to reconsider his prior decision.

in the Act were developed after a three-year study conducted by the National Council on Crime and Delinquency and an analysis of the results of a pilot project begun in October 1972 in one of the Commission's regions, then were applied nationwide through regulations, and, when demonstrated by further evaluation to be valuable to the parole process, were adopted by Congress. See generally S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. (1976).

The reforms include a system of periodic review hearings, the use of specific guidelines to help acnieve consistent treatment of similar cases, and a detailed enumeration of the information to be considered in parole release decisions. In addition, the Commission recently has instituted a practice of attempting to set, early during a prisoner's sentence, a presumptive release date; the Commission is seeking to reduce the uncertainty that prisoners experience while waiting to know how long they must remain in prison (see 28 C.F.R. 2.12, 42 Fed. Reg. 39811). If this Court should hold that the Due Process Clause applies to parole release determinations whether or not the parole statute creates a clear entitlement to parole absent specified findings of unsuitability, future experimentation and alteration of the parole process could be inhibited.

Moreover, in addition to parole, many types of decisions affecting prisoners, such as those concerning eligibility for work-release programs and furloughs, involve opportunities for prisoners to acquire some "conditional liberty" at the discretion of penal auth-

orities. Similarly, many decisions that do not involve a temporary release from incarceration may nevertheless involve greater liberty within the institution—decisions relating to security classifications and work assignments are but two of many examples. The Court's resolution of the question presented here could have significant implications for the institutional handling of such decisions.[3]

STATEMENT

1. Nebraska inmates are eligible for release on parole on completion of their minimum sentences,

[3] A federal prisoner may apply for a discretionary short-term release on furlough. One court of appeals has held that there is no need for prison officials to provide hearings concerning such applications (*Smith* v. *Saxbe*, 562 F.2d 729, 734-735 (D.C. Cir. 1977)), but the Second Circuit has held that furloughs are like parole and may not be denied without hearings (*Zurak* v. *Regan*, 550 F.2d 87, cert. denied, 433 U.S. 914 (1977)). See also *Durso* v. *Rowe*, 579 F.2d 1365 (7th Cir. 1978) (work release involves a liberty interest). Similarly, many administrative decisions concerning a prisoner may affect his opportunity for parole or the amount of personal freedom he enjoys within the prison. The courts of appeals do not agree whether the Bureau of Prisons must afford hearings concerning these decisions. Some courts hold that hearings are necessary. See *Polizzi* v. *Sigler*, 564 F.2d 792 (8th Cir. 1977); *Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975). Other courts conclude that the Constitution does not require hearings. See *Solomon* v. *Benson*, 563 F.2d 339 (7th Cir. 1977), overruling *Holmes* v. *United States Board of Parole*, 541 F.2d 1243 (7th Cir. 1976); *Walker* v. *Hughes*, 558 F.2d 1247 (6th Cir. 1977); *Marchesani* v. *McCune*, 531 F.2d 459 (10th Cir.), cert. denied, 429 U.S. 846 (1976). Cf. *King* v. *Warden*, 551 F.2d 996 (5th Cir. 1977). See also *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976).

reduced by good time credits. Neb. Rev. Stat. § 83-1, 110 (1976). Each prisoner, whether or not eligible for parole, receives a yearly parole review hearing. Neb. Rev. Stat. § 83-192(9) (1976). In addition, each inmate has a parole review hearing within 60 days of becoming eligible for parole. Neb. Rev. Stat. § 83-1,111(1) (1976). After the interview, the Board notifies each inmate whether he will be granted a formal parole hearing. If a formal hearing is not granted, the Board tells the prisoner why release was deferred and makes recommendations concerning how the prisoner may correct any deficiencies.

If the Board determines that a formal parole hearing is warranted, it notifies the inmate of the month in which the formal hearing will be held. The inmate learns the exact day and time of the hearing only on the day it takes place. At the hearing the inmate may offer evidence and may be assisted by counsel. Neb. Rev. Stat. § 83-1,112(2) (1976). The Board maintains a complete record of the procedings. Neb. Rev. Stat. § 83-1,111(1) (1976). If parole is denied, the Board must furnish the prisoner within 30 days with a written statement of the reasons for the denial. Neb. Rev. Stat. § 83-1,111(2) (1976).

The Board's decision is governed by the statutory direction that an inmate eligible for parole "shall be released" unless the Board makes at least one of the following four findings:

> (a) There is a substantial risk that [the prisoner] will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Neb. Rev. Stat. § 83-1,114(1) (1976). The statute also identifies numerous factors that the Board must consider in arriving at its decision.[4]

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[4] Neb. Rev. Stat. § 83-1,114(2) (1976) provides:

In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

[Footnote continued on page 9]

2. Respondents filed the present suit as a class action in the United States District Court for the District of Nebraska. They contended that the Due Process Clause requires procedures more elaborate than those followed by the Board, and they requested both an injunction and damages. Respondents contended that the Constitution requires the Board to (Pet. App. 25-26): (1) inform prisoners of the criteria governing release decisions; (2) inform prisoners in advance of the dates and times of their hearings; (3) permit prisoners to present evidence (through documents and witnesses); (4) "confront the inmates" with adverse evidence; (5) allow prisoners to cross-examine any adverse witnesses; (6)

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[4] [Continued]

(i) The offender's mental or physical makeup including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

maintain a complete record of all proceedings; (7) permit representation of prisoners by attorneys in all proceedings; (8) provide explicit statements of reasons for the denial of release; and (9) inform prisoners of the evidence relied on in denying release.[5]

After some preliminary proceedings (Pet. App. 25 n.2), the district court held that all prisoners have a "liberty" interest in release on parole (*id.* at 29-36). In light of this interest, the court held, the Due Process Clause requires parole authorities to follow certain minimum procedures (*id.* at 39-44): (1) every eligible inmate must receive a full parole hearing; (2) the inmate must receive notice, at least 72 hours before the hearing, of the hearing's date, and the notice must include a statement of the factors to be considered by the Board; (3) subject to considerations of prison security, the inmate must be allowed to appear and present evidence, including witnesses; (4) the Board must create written records of the hearings; (5) within a reasonable time after the hearing, the Board must give each inmate a written notice of the reasons for its decision and of the evidence on which it relied. The court denied respondents' request for money damages (*id.* at 47).

3. The court of appeals agreed with the district court that the inmates have a liberty interest in their applications for release on parole, but it based this decision on the particular aspects of Nebraska law

[5] Respondents also challenged the State's work release procedures, but this portion of the suit was dismissed for failure to join an essential defendant. Pet. App. 26-27.

creating the entitlement (Pet. App. 4-14). The court held that "Neb. Rev. Stat. § 83-1,114 provides the inmates with a justifiable expectation rooted in state law that they will be conditionally released if they meet the statutory standards" (*id.* at 13).[6]

[6] Portions of the court's opinion appear to agree with the district court that all prisoners have a liberty interest in their desire to be released on parole, regardless of the provisions of state law. See, *e.g.*, Pet. App. 6 ("[t]he nature of the interest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration—and thus the Fourteenth Amendment applies to both"). But other portions of the court's opinion expressly place reliance on the provisions of state law. See, *e.g.*, the passage quoted in the text and Pet. App. 7 (Nebraska law "provides that a prisoner eligible for parole is to be released on parole unless he is found to be unfit for one of the reasons listed in the statute. Thus, the Board's decision of whether to grant parole necessitates a factual determination"), *id.* at 9 ("[t]he inmates' interest in this case is the right to be considered for parole, a right created by Nebraska law").

In a more recent decision the court held that Missouri law, which does not contain a presumption in favor of release but which sets out rudimentary criteria for parole officials to consider, also creates a liberty interest. The court stated that the Nebraska and Missouri statutes both "create a justifiable expectation rooted in state law that if the statutory criteria are satisfied the inmate will be released on parole." *Williams* v. *Missouri Board of Probation and Parole*, No. 78-1136 (8th Cir. Oct. 27, 1978), slip op. 5. The court concluded that this "justifiable expectation" is a liberty interest, and that the Due Process Clause therefore applies. In extending the coverage of the Clause to a parole system that does not contain a presumption in favor of release—or indeed any criteria that will call for release—the court in *Williams* overruled sub silentio two earlier decisions. See *Kelsey* v. *Minnesota*, 565 F.2d 503, 506-507 n.3 (8th Cir. 1977) ("[i]f a parole board refuses to grant parole, [an] inmate has suffered no deprivation"); *Barnes* v. *United States*, 445 F.2d 260 (8th Cir. 1971).

The court of appeals then addressed the question of what process is due. The court concluded that the prisoner's interest in being released is substantial (Pet. App. 15). The Board's interest in avoiding cumbersome procedures, the court thought, also is important, but it believed that additional procedures would not be detrimental to the Board's operations because the Board, like the prisoner, has an interest "in seeing that parole is neither granted nor denied on the basis of inaccurate information or an erroneous evaluation" (*ibid.*).

The court held that the Board must give each prisoner a formal parole hearing when he first becomes eligible for parole, but that it need not hold additional hearings if it denies parole at the first eligibility (Pet. App. 16-17). The Constitution also requires formal notice, at least 72 hours in advance, of the "date and hour for * * * the hearing" (*id.* at 17), so that the prisoner may have a "fair opportunity to prepare for his appearance before the Board" (*id.* at 18). The court held that this notice "must be accompanied by a listing of the criteria governing the Board's * * * decisions," because such notice "is only fair" (*ibid.*). The statutory criteria themselves give sufficient notice, the court reasoned, so that this constitutional requirement means only that the Board must provide each inmate with a copy of the statute (*ibid.*).

The court next held that "[s]ubject to prison security considerations an inmate must be allowed to appear in person before the Board and to present

documentary evidence" (Pet. App. 19). The right to make a presentation would not be effective, the court reasoned, unless the prisoner could appear in person. But, it went on, "in the absence of exceptional circumstances the prisoner does not have a constitutional right to call witnesses in his behalf" (*ibid.*). The court suggested that the Board exercise its discretion to permit the calling of witnesses (*id.* at 20).

The court held that a tape recording of the hearing is sufficient to satisfy the constitutional requirement that a record of the proceedings be kept, so long as the recording is of sufficient quality to permit written transcription (Pet. App. 20).

Finally, the court concluded, the Board must give the prisoner a written statement of reasons if it denies parole (Pet. App. 20). This statement need not include detailed findings of fact, the court stated, but must inform the prisoner of the "essential facts relied on by the Board in reaching its decision" (*id.* at 21). The court reasoned that this constitutional requirement facilitates judicial review of parole decisions, induces the Board to think about its decisions, promotes the goal of rehabilitation by informing the prisoners how they can improve their chance of release, and promotes the development of a body of administrative precedent (*id.* at 21-22).

The district court had rejected respondents' argument that the Due Process Clause requires the presence of counsel and an opportunity to confront and cross-examine adverse witnesses (Pet. App. 38 n.8). Because respondents did not cross-appeal from the

district court's decision, the court of appeals had no occasion to consider whether the Constitution requires these procedures.

INTRODUCTION AND SUMMARY OF ARGUMENT

Parole release decisions are of great importance to each prisoner, and it is concomitantly important that such decisions be made only after studied deliberation and hearings that minimize the chance that the decisions will be based on misapprehensions of fact or mistaken judgment. For that reason, the federal Parole Commission provides hearings calculated to solicit the views of prisoners and to keep them informed of the standards by which decisions will be made and the reasons for the decision in their particular cases. The court of appeals, seeking to improve the quality of parole release decisions in the states, has required Nebraska's Board of Parole to follow procedures similar to those of the Commission.

But the question here is not whether more elaborate procedures would be wise, but rather whether the task of defining and implementing the government's policy with regard to parole proceedings is vested by the Constitution in the legislative and executive branches, or rather in the courts under the Due Process Clause. That hearings, access to evidence, detailed statements of reasons and other formal procedures may improve the comprehensiveness and accuracy of a parole board's fact-gathering and decision-making functions does not answer this question, for there is no abstract constitutional right to be free of procedures that entail significant risks of error. Due process rights are implicated only when liberty or property is at stake.

Legislatures and administrators, as well as courts, are sensitive to the legitimate needs and desires of prison inmates. Congress recently enacted the Parole Commission and Reorganization Act, which affords prisoners many rights. Congress believed that its action struck a fair balance between the legitimate interests of the inmate and the needs of society for protection and deterrence. See S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 20-28 (1976). Nebraska also affords each prisoner a personal interview, but its procedures differ in other respects from those used by federal authorities. As we learn more about the results of the procedures now in use, or as ideas concerning the role of prisons in our society evolve, still other procedures may come to appear desirable. The United States believes that the choice of procedures usually is constitutionally within the province of the legislature and the executive, which have the better opportunity to study the procedures in use and to evaluate their merits and demerits. If, however, a legislative elects to create a legitimate claim of entitlement to parole, then parole procedures become subject to judicial scrutiny. In our view Nebraska, but not the United States, has made such a choice, by creating for eligible inmates a statutory entitlement to early release.

Over the past several decades society's views with regard to crime and the purposes of imprisonment have undergone considerable change; ideas concerning

the proper role of parole, and the proper procedures to use in considering parole, have changed with them.[7] We do not yet know which parole release process is best; indeed, social science research is barely adequate to enable us to frame the pertinent questions.[8] The

[7] Punishment and retribution once were viewed as the major justifications of imprisonment, but society adopted rehabilitation and then deterrence as substitute rationales. See *United States* v. *Grayson*, No. 76-1572 (June 26, 1978), slip op. 4-10; *Williams* v. *New York*, 337 U.S. 241 (1949); F. Zimring & G. Hawkins, *Deterrence* (1973). Many scholars have subjected all of these rationales—and the penalty of imprisonment itself—to scrutiny. The emerging consensus appears to concentrate on deterrence and "desert" as justifications for punishment and suggests that fines and determinate sentences are the best punishments. See generally H. L. A. Hart, *Punishment and Responsibility* 1-27, 158-237 (1969); N. Morris, *The Future of Imprisonment* (1974); H. Packer, *The Limits of the Criminal Sanction* 17-102 (1968); E. van den Haag, *Punishing Criminals* (1975); A. von Hirsch, *Doing Justice* (1976); J. Wilson, *Thinking About Crime* (1975). See also K. Elzinga & W. Breit, *The Antitrust Penalties* 97-138 (1976); R. Posner, *Economic Analysis of Law* 164-172 (2d ed. 1977).

Dean Morris suggests that presumptive release dates be set early during an offender's imprisonment and that the release dates not depend on the offender's institutional behavior. The Parole Commission's experimental practices are based on Dean Morris's analysis, and, under this system, little purpose is served by detailed adversarial hearings. Von Hirsch suggests that parole be abolished or converted into a system that is almost automatic; if this system is adopted there would be little point in holding release hearings. See A. von Hirsch, *Abolish Parole?* (1978).

[8] Compare D. Stanley, *Prisoners Among Us: The Problem of Parole* (1976) (surveying the practices of federal and state parole systems and recommending the abolition of parole), with Project, *Parole Release Decision-making and the Sentencing Process*, 84 Yale L.J. 810 (1975) (assessing release decisions under the federal parole release guidelines).

needed knowledge can be acquired, if at all, only by a painstaking process of experimentation, change, trial, and error, similar to that in which the federal Parole Commission is engaged. Perceptions of the role of imprisonment and of the objectives it can and should accomplish can be expected to continue to change. So will ideas about the proper place of parole and the proper way to go about deciding when to grant parole. Decisions on these and similar questions are best left to society at large and to the representatives they elect, unless the Constitution requires otherwise in this case.

I

A. The court of appeals' requirement of more elaborate parole procedures was based on the Due Process Clause of the Fourteenth Amendment. But that Clause applies only where governmental action threatens to deprive an individual of "liberty" or "property." Thus the evaluation of the case must begin with an inquiry into whether the denial of parole deprives respondents of a constitutionally protected liberty or property interest.

B. Denial of parole does not deprive a prisoner of liberty. He was lawfully deprived of his liberty on conviction, sentence, and incarceration—all processes that are surrounded by elaborate constitutional safeguards. The denial of parole simply continues the prisoner's incarceration for a period within the term already constitutionally imposed.

Certainly a prisoner is interested in securing his release on parole. But a prisoner's desire to obtain

his freedom from confinement is not, without more, constitutionally cognizable as a "liberty" interest. The values that underlie the analysis of claims of "liberty" interests in non-prisoner cases do not, by and large, pertain to persons lawfully confined. See *Meachum* v. *Fano*, 427 U.S. 215 (1976). A prisoner's legally protected interests relating to release are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms of his confinement. Apart from concerns under the Cruel and Unusual Punishment Clause of the Eighth Amendment, a prisoner has no protected liberty interest unless those statutes, regulations, and rules create legitimate claims of entitlement.

This Court's decisions make clear that a legitimate claim of entitlement warranting the procedural protections of due process exists only when the state has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings. See *Moody* v. *Daggett*, 429 U.S. 78 (1976); *Meachum* v. *Fano*, *supra*. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974):

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from substantive law and not from any person's unilateral expectation.

C. Nebraska law provides that an inmate "shall be released" on parole at the expiration of a minimum term, reduced by good time credits, unless the Board of Parole finds the existence of one or more of four factors spelled out in the statute. This statutory presumption in favor of release limits the Board's discretion and gives the prisoner a legitimate claim of entitlement to be released, subject to defeasance only if the Board satisfies the statutory criteria. Under the analysis of six Justices in *Arnett* v. *Kennedy*, *supra*, a statutory presumption of this sort creates a "property" interest protected by the Due Process Clause. Accordingly, although we submit that most parole systems, including the federal system, involve neither liberty nor property, and thus are not subject to the procedural requirements of the Due Process Clause, we conclude that Nebraska's unusual system creates such an interest.

II

Once a court has concluded that a governmental decision may deprive a person of liberty or property, it must decide what process is due. Because respondents did not appeal from the portion of the district court's decision that was adverse to them, the Court need not decide in this case whether the Constitution requires the elaborate procedures specified by the Court in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), for the revocation of parole or whether, instead, the appropriate procedures should be modeled on those that the Court selected in *Wolff* v. *McDonnell*, 418

U.S. 539 (1974), and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), for use when hearings held within prison walls may affect the length of confinement.

The court of appeals here has required procedures that are quite similar to those of *Wolff* and *Baxter*. We therefore believe that its judgment should be affirmed in most respects. But the court exceeded constitutional requirements in ordering state officials to hold oral hearings in every case at the first possible opportunity. In some cases it will be clear from written files that the prisoners have no hope of being paroled; in such cases there is no need for an oral hearing. Moreover, although this Court often has held that the Due Process Clause requires a simple statement of reasons, it never has held that the Clause requires administrative officials to summarize the evidence that supports their decisions. In these two respects, therefore, the decision of the court of appeals should be reversed.

ARGUMENT

I

THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE APPLY TO PAROLE RELEASE DECISIONS ONLY IF THE PAROLE STATUTE CREATES AN ENTITLEMENT TO EARLY RELEASE

Parole is a statutory creation. The rules under which an inmate is entitled to be considered for parole are designed by each state and, for federal inmates, by Congress. A state could design a parole system

under which the parole decision is committed to the unfettered discretion of the parole authorities. The use of such a discretionary system of parole, although it might create in inmates an expectation of early release, would not create legitimate claim of entitlement to release. The United States and most of the states employ such a discretionary system. See 28 C.F.R. 2.18.

But a state also could design a parole system under which every prisoner becomes entitled to early release unless state officials can establish some good reason for denying release. Nebraska has such a system. The State's statute provides that every prisoner eligible for parole shall be released unless the Board finds that one of the statutory criteria sufficient to deny release has been established. Because Nebraska's inmates have a justifiable expectation of early release grounded in state law, the Due Process Clause requires that they be provided with certain procedural protections before the State can act to disappoint the statutory expectation.

A. The Procedural Protections of the Due Process Clause Apply Only to Proceedings That may Result in the Deprivation of a Person's "Liberty" or "Property"

The procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group. By its terms, the Clause applies only in those circumstances in which governmental action threatens to deprive a

person of "liberty" or "property." [9] Accordingly, this Court, in evaluating claims of right to procedural due process, has been careful to identify the nature of the interests at stake. The Court explained in *Meachum* v. *Fano*, 427 U.S. 215 (1976), that the range of interests properly characterized as liberty or property is finite and that, particularly when prisoners are involved (*id.* at 215; emphasis in original):

> To hold that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.

See also *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976).

Perhaps the paradigm case is *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract, and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The Court agreed with Roth that he possessed an "interest" in continued employment, in the sense that termination of employment is a "grievous loss." But that fact, the Court held, was not determinative of

[9] We need not discuss here the special situation in which the governmental action threatens to deprive a person of his life. See generally *Gardner* v. *Florida*, 430 U.S. 349 (1977).

the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment—his desire to obtain a renewal of his contract—was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that a showing of "grievous loss" may be a necessary condition for the invocation of due process safeguards, but it is not a sufficient one. Thus, although a prisoner's "interest" in being released on parole is substantial, it cannot be dispositive of the due process claim in this case. To the contrary, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the person may be deprived is a liberty or property interest. See *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 838-841 (opinion of the Court), 856-864 (Stewart, J., concurring) (1977); *Meachum* v. *Fano*, *supra*; *Goss* v. *Lopez*, 419 U.S. 565, 572-576 (1975). We turn to that inquiry.

B. Except to the Extent That he may Have a Legitimate Claim of Entitlement Grounded in the Statutes, Regulations, or Rules Governing the Terms of his Confinement, a Prisoner has no Liberty or Property Interest in Being Released on Parole

It may at first blush appear paradoxical to assert that a prisoner has no "liberty" interest in being released from confinement on parole. The most elementary form of liberty, freedom from the state's physical control, is at stake in the parole decision. But the threshold question under the Constitution is whether an adverse parole decision "deprives" the prisoner of liberty he possesses or to which he is entitled. The answer, we believe, is that it does not.

Meachum v. *Fano*, *supra*, demonstrates that, "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty" (427 U.S. at 224). "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). See also *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977). A prisoner loses his "liberty" when he is lawfully placed in the state's custody, and his interest in freedom from confinement is not revived until he is released.[10]

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[10] This is not to say that a prisoner retains no constitutionally cognizable liberty interests. Cf. *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556 (1974).

This consideration distinguishes the denial of parole from its revocation. A prisoner's generalized liberty interest in freedom has been extinguished for the lawful term of confinement. Parole, once granted, revives that interest. At a parole revocation proceeding, the parolee attempts to defend his liberty, albeit conditional, against those who would take it from him; "execution of the [parole violator's] warrant and custody under that warrant [are] the operative events triggering any loss of liberty attendant upon parole revocation. This is a functional designation, for the loss of liberty * * * does not occur until the parolee is taken into custody under the warrant." *Moody* v. *Daggett*, *supra*, 429 U.S. at 87. See also *Morrissey* v. *Brewer*, 408 U.S. 471, 480-482 (1972); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). A prisoner seeking parole, however, has no generalized "liberty" interest in the parole board's decision, for he is not at liberty and does not stand to lose any liberty as a result of that decision. In short, the fact that a prisoner's freedom may be affected does not, in and of itself, mean that a constitutionally protected liberty interest is at issue.

Wolff v. *McDonnell*, 418 U.S. 539 (1974), supports this analysis. The question in *Wolff* was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn on the mere fact that a reduction in good-time

credits might affect the timing of the prisoner's release; the Court did not conclude that the prospect of release from prison is constitutionally protected liberty. Instead, the Court focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Because that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court determined that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach makes the existence of a liberty interest turn on the difference between personal expectation and statutory entitlement. It has been confirmed by recent cases. *Meachum* v. *Fano, supra,* held that a prisoner has no right to a hearing concerning his transfer to a prison the conditions of which are substantially less favorable to him. Because state law "conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct[,] * * * [t]he predicate for invoking the protection of the Fourteenth Amendment * * * [was] totally nonexistent" (427 U.S. at 226-227). Similarly, in *Smith* v. *Organization of Foster Families, supra,* the Court rejected the district court's conclusion that the magnitude of a person's interest is sufficient to require procedural protections, pointing out that the existence of even a very important interest "does not, in and of itself, implicate the due process guarantee" (431 U.S. at 840). The Court has "rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right" (*Moody* v. *Daggett, supra,* 429 U.S. at 88 n.9).

Meachum, Moody and *Wolff* recognize that the generalized interest in personal freedom from restraint is part of "liberty" only for the general population and not, in the main, for persons lawfully confined. A prisoner's interests relating to release are based not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms of his confinement. Except to the extent that those statutes, regulations, and rules create a legitimate claim of entitlement to release, a prisoner has no liberty or property interest in obtaining an early release from confinement to which the procedural protections of due process could pertain. Accordingly, although a prisoner's interests in release from confinement may for purposes of convenience be called "liberty" interests, they are simply entitlements created by positive law.[11] Once a prisoner has

[11] Indeed, this may also be true with respect to a parolee's interest in retaining his freedom. In *Morrissey* v. *Brewer, supra,* a case that purportedly turned on the parolee's "liberty" interest, the right of which the parolee would be deprived by wrongful revocation was in fact a statutorily created "property" interest—the entitlement to remain at

been released on parole, he has a legitimate claim of entitlement—created by positive law—not to be reimprisoned unless he violates the terms and conditions of his release. A prisoner seeking release in the first instance has such an interest only if the state creates it.

In short, whatever the scope of Fourteenth Amendment "liberty" interests may be in other cases, a prisoner's interest relating to release from confinement, to be constitutionally entitled to the procedural protections of due process, must rest on a legitimate claim of entitlement grounded in the statutes, regulations, or rules governing the terms of his confinement. Thus the analysis to be applied here must be similar to that employed by this Court in decisions involving the assertion of property interests.

Those decisions make it clear that a property interest arises only when the condition limiting the Executive's freedom of action exists in substantive law and not merely in the hopes or expectations of the person. This Court in *Roth* explicitly rejected the argument that a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

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large unless and until it was demonstrated that he had violated the terms of his parole. See *Moody* v. *Daggett, supra,* which analyzed impending parole revocations in these terms.

See also *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 860 (Stewart, J., concurring); *Meachum* v. *Fano, supra,* 427 U.S. at 228.

A legitimate claim of entitlement exists only when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings. So, for example, in *Morrissey* v. *Brewer, supra,* the parolee had a statutory right to remain free unless he violated the terms of his parole; in *Goss* v. *Lopez, supra,* the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the employee could be terminated only for cause; in *Perry* v. *Sindermann,* 408 U.S. 593 (1972), the teacher asserted a well-settled practice of reemployment absent "sufficient cause." [12] Where the state has bound itself to extend or confer a benefit, or withhold a sanction, on the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that those findings will be

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[12] See also *Memphis Light, Gas & Water Division* v. *Craft,* 436 U.S. 1, 9-12 (1978) (receipt of water is a property interest because statute guarantees service as long as bill is paid) *Dixon* v. *Love,* 431 U.S. 105, 112-113 (1977) (driver's license is a property interest because it could be revoked only for cause); *Ingraham* v. *Wright,* 430 U.S. 651, 672-674 (1977) (a student has a liberty interest in his bodily integrity); *Mathews* v. *Eldridge,* 424 U.S. 319, 332 (1976) (a person has a property interest in disability benefits because his entitlement turns on specific facts); *Richardson* v. *Perales,* 402 U.S. 389, 401-402 (1971) (same).

made fairly and accurately. That is why the Court held in *Morrissey* that the Due Process Clause applies to revocations of parole, which turn on a finding of violation of the terms of release.

On the other hand, where the state has not set up rules that make particular decisions turn on particular findings, there can be no legitimate claim of entitlement. In *Meachum* v. *Fano*, for example, the state had discretion to transfer the prisoner without regard to his misconduct, and no set of facts he could prove would entitle him to remain at the place of original incarceration. In *Board of Regents* v. *Roth*, the University had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to stay on the job. When there is no statutory presumption and no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

We turn, therefore, to an application of these principles to the facts of this case.

C. Nebraska Law Gives Prisoners Eligible for Parole a Legitimate Claim of Entitlement to Release

Application of the test we have outlined above to the parole procedures of most states, and of the United States, leads to the conclusion that prisoners have no legitimate claim of entitlement to release, and that the Due Process Clause therefore does not apply. We have taken that position with respect to the parole systems of North Carolina,[13] Kentucky,[14] New York,[15] and the United States.[16] We adhere to that position. Under most systems of parole consideration, the decision to postpone further parole consideration for a particular period of time depends on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). Parole may be granted or denied "for a variety of reasons [that] often involve no more than informed predictions as to what would best serve [penological purposes] or the safety and welfare of the inmate." *Meachum* v. *Fano*, *supra*, 427 U.S. at 225.

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[13] Brief for the United States as *amicus curiae* in *Weinstein* v. *Bradford*, 423 U.S. 147 (1975).

[14] Brief for the United States as *amicus curiae* in *Scott* v. *Kentucky Parole Board*, 429 U.S. 60 (1976).

[15] Brief for the United States as *amicus curiae* in *New York State Parole Board* v. *Coralluzzo*, cert. dismissed as improvidently granted, 435 U.S. 912 (1978).

[16] *Id.* at 31 n.15.

Unless a parole system sets up a presumption in favor of release or specifies particular facts that govern the release decision, the parole system could not involve a legitimate claim of entitlement to release. So long as the system of release is fundamentally an exercise of informed discretion, no fact or set of facts that a prisoner could prove would establish an entitlement to have parole authorities place trust in his character or believe that the interests of society require his release.[17] Because the

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[17] The federal Parole Commission's guidelines articulate some objective criteria that influence release decisions. These guidelines do not, however, diminish the Commission's discretion or give any prisoner a legitimate claim of entitlement to release. They indicate a convenient point of reference, a "normal" range of release times, but the Commission is free at any time, and for any constitutionally permissible reason, to depart from these ranges. See 28 C.F.R. 2.18 ("[t]he granting of parole to an eligible prisoner rests in the discretion of the United States Parole Commission"); 28 C.F.R. 2.20(c) (the "time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered").

Because the Parole Commission has not made the exercise of its discretion turn on the presence or absence of determinable facts, a federal prisoner has no legitimate claim of entitlement to release. A more difficult problem arises with respect to a contention by a prisoner that he should be released no later than the maximum time set by the guidelines for cases similar to his. Congress has provided in 18 U.S.C. 4206(c) that the Commission may deny release notwithstanding the guidelines "if it determines that there is good cause for so doing * * *." That "good cause" requirement, like the requirement of *Arnett* v. *Kennedy, supra,* may give the prisoner some claim of entitlement to release, subject to defeasance only for good cause. But, because the Commission retains

parole decision usually is not controlled by any particular controvertible facts, prisoners usually have no liberty or property interest in being granted parole at any particular time.[18]

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substantial discretion to determine "good cause," and because "good cause" itself may involve subjective judgments that are not capable of proof or disproof, it may be that the prisoner's only entitlement is to thorough consideration and a statement of reasons, rather than to release. If the prisoner's entitlement is so viewed, the Due Process Clause would not necessarily apply.

The federal parole system does, however, create one clear liberty or property interest. 18 U.S.C. 4206(d) establishes a presumption in favor of release after a prisoner has served two-thirds of his sentence, or 30 years' imprisonment, whichever is less. This operates much like Nebraska's system, and it creates a legitimate claim of entitlement for the reasons discussed in the text.

[18] The courts of appeals are divided on the question whether the Due Process Clause applies to the processing of applications for parole. The Third, Fifth, Sixth, Ninth and Tenth Circuits hold that it does not. See *Mosley* v. *Ashby,* 459 F.2d 477 (3d Cir. 1972); *Madden* v. *New Jersey State Parole Board,* 438 F.2d 1189 (3d Cir. 1971); *Cruz* v. *Skelton,* 543 F.2d 86 (5th Cir. 1976); *Brown* v. *Lundgren,* 528 F.2d 1050 (5th Cir.), cert. denied, 429 U.S. 917 (1976); *Scarpa* v. *United States Board of Parole,* 477 F.2d 278 (5th Cir.) (en banc), vacated as moot, 414 U.S. 809 (1973); *Scott* v. *Kentucky Parole Board,* No. 74-1899 (6th Cir. Jan. 15, 1975), remanded to consider mootness, 429 U.S. 60 (1976), reaffirmed *sub nom. Bell* v. *Kentucky Parole Board,* 556 F.2d 805 (1977), cert. denied, 434 U.S. 960 (1978); *Walker* v. *Hughes, supra; Dorado* v. *Kerr,* 454 F.2d 892 (9th Cir. 1972); *Schawartzberg* v. *United States Board of Parole,* 399 F.2d 297 (10th Cir. 1968). But cf. *Hill* v. *Attorney General of the United tSates,* 550 F.2d 901 (3d Cir. 1977) (by discussing the constitutional adequacy of reasons given for denial of parole, the court implies that the Due Process Clause applies).

[Footnote continued on page 34]

Nebraska law, however, follows a different pattern. The pertinent statute (Neb. Rev. Stat. § 83-1,111(1) (1976)) provides that every prisoner shall have a release hearing "within sixty days before the expiration of his minimum term less any reductions." Neb. Rev. Stat. § 83-1,114(1) (1976), then

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[18] [Continued]

The Second, Fourth, Seventh and District of Columbia Circuits, on the other hand, have held that the expectation of parole release always is a form of liberty that cannot be denied without procedural protections. Each court has reached this conclusion by a process that indicates that the details of a particular parole program are irrelevant; each court considers the prospect of personal freedom after parole, by itself, to be the "liberty" interest involved. See *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* 500 F.2d 925 (2d Cir. 1974), vacated as moot, 419 U.S. 1015 (1975); *Coralluzzo* v. *New York State Parole Board,* 566 F.2d 375 (2d Cir. 1977), cert. dismissed as improvidently granted, 435 U.S. 912 (1978); *Bradford* v. *Weinstein,* 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); *Franklin* v. *Shields,* 569 F.2d 784 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978); *United States ex rel. Richerson* v. *Wolff,* 525 F.2d 797 (7th Cir. 1975); *Childs* v. *United States Board of Parole,* 511 F.2d 1270 (D.C. Cir. 1974).

A closely related question is whether the setting of a tentative release date establishes a "liberty" interest so that hearings are required before the date can be altered. Compare *Sexton* v. *Wise,* 494 F.2d 1176 (5th Cir. 1974), and *McIntosh* v. *Woodward,* 514 F.2d 95 (5th Cir. 1975) (no liberty interest until actual release), with *Drayton* v. *McCall,* No. 78-2030 (2d Cir. Oct. 2, 1978), and *Robinson* v. *Benson,* 570 F.2d 920 (10th Cir. 1978) (setting of tentative release date creates a liberty interest). The Solicitor General is considering whether to authorize the filing of a petition for a writ of certiorari in *Drayton.*

provides that "[w]henever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because [of one of several enumerated possibilities]." These two statutes, read together, give every Nebraska prisoner a legitimate claim of entitlement to release on parole, subject to defeasance only if the parole authorities find one of a limited number of things.

This presumption in favor of release—missing from the federal parole statute and from most other state statutes—operates much like the system of good-time credits at issue in *Wolff* v. *McDonnell, supra.* The state statute creating good-time credits gave every inmate an entitlement to early release; the entitlement could be withdrawn only on the occurrence of specified circumstances (usually misconduct). The Court held that this system of entitlements was a form of liberty or property (418 U.S. at 546).

Under Nebraska law the system of good-time credits and the system of parole differ in the nature of the findings that are sufficient to withhold early release. Only serious misconduct justifies withdrawing good-time credits; a number of more diffuse and discretionary criteria may be invoked to deny early release on parole. Petitioners argue that this difference prevents a conclusion that the statutory presumption in favor of parole creates a legitimate claim of entitlement. Cf. *Meachum* v. *Fano, supra,* 427 U.S. at 226-227.

But *Meachum* involved essentially unbridled discretion; the Court held that the Due Process Clause did not apply to transfers from one prison to another because there was no rule giving a prisoner an entitlement to reside in any particular prison. Here, however, there is a statutory presumption in favor of parole; administrative discretion is not unbridled. The Nebraska parole statute is quite similar to the federal statute involved in *Arnett* v. *Kennedy, supra*, and in *Arnett* six Justices concluded that the statute had created a property interest.

Arnett involved federal employment. The governing statute provided that a person who had completed a probationary term of employment had an expectation that he would continue to be employed. He could be fired or suspended "only for such cause as will promote the efficiency of the service." 5 U.S.C. 7501. Although this requirement of "good cause" is surely vague, and calls for discretionary decisions, the Court held that, when coupled with the statutory presumption in favor of continued employment, the statute set up a property interest that could be terminated only in accord with procedures established by the Due Process Clause. See 416 U.S. at 165-166 (opinion of Powell, J.), 177-186 (opinion of White, J.), 207-211 (Marshall, J., dissenting). Here, as in *Wolff* and *Arnett*, a statute has created an expectation that the state may not disappoint without following procedures required by the Due Process Clause.[19]

[19] Although we have argued above that other statutes, without the presumption in favor of release found in Nebraska's

statute, do not create a legitimate claim of entitlement to release, we do not argue that no constitutionally protected interest is involved in the federal parole process and the process of these other states. Under federal law, and the law of most states, an inmate has a right to be considered for parole at a particular time. The government may not refuse to consider a prisoner for parole, or change the date of eligibility for consideration, without due process. But this case does not involve a contention that any person, otherwise eligible for parole, was denied consideration.

It bears repeating, however, that the fact that state law requires consideration of a person for parole does not, standing alone, require the use of any particular procedures on that consideration. Unless the right to be considered entails a legitimate claim of entitlement to a particular outcome contingent on particular facts, there is no liberty or property interest. (In *Meachum* v. *Fano, supra*, for example, state regulations gave every inmate transferred from one prison to another a right to a rudimentary hearing. The Court held, however, that the Constitution did not require any particular procedures to be used during the hearing, because the ultimate decision to transfer depended entirely on the discretion of prison officials.)

If our constitutional analysis is correct, Nebraska may avoid any constitutional procedural requirements by amending its statutes to eliminate the presumption in favor of release. Respondents may argue that the state should not be allowed this option. They may contend, as the prisoners in recent parole cases have contended, that parole has become an accepted feature of our prisons, and that prisoners acquire a legitimate expectation of release because most prisoners are released sometime before the ends of their terms. Because eventual parole is the rule rather than the exception, the argument would run, the prisoner's expectation has real substance. But the same argument was rejected in *Roth*; there, too, most teachers were rehired. It was rejected again in *Meachum*; few prisoners were sent to more secure prisons unless they misbehaved in some way, but the Court held that this did not give any prisoner a legitimate claim to avoid his own transfer. The problem with the argument based on the observation that parole (or retention on the job) is common

II

THE DUE PROCESS CLAUSE REQUIRES NEBRASKA PAROLE OFFICIALS TO GIVE PRISONERS A FAIR OPPORTUNITY TO BE CONSIDERED FOR PAROLE

If, as we have argued above, the Due Process Clause applies to parole release proceedings in Nebraska, then the Court must decide what process is due. It need not, however, essay a definite resolution to that question. Nebraska already employs certain procedures, including (in many cases) personal hearings that are tape-recorded, and it gives statements of reasons when it denies release (see page 7, *supra*). There is no need for the Court to consider whether the Constitution requires the State to follow these procedures. On the other hand, the district court rejected several of respondents' original contentions and held, for example, that the Constitution does not require the attendance of counsel and cross-examination of witnesses at the hearings (Pet. App. 38 n.8). Because respondents did not appeal from this adverse determination, these questions are

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is that it does not explain how the fact that *most* teachers are rehired, that *most* prisoners stay where they are, and that *most* prisoners eventually are paroled can be converted into a legitimate claim of entitlement for *this* teacher to be rehired or for *this* prisoner to be paroled. That conversion could be accomplished only through a set of rules of general applicability establishing substantive release criteria binding on the decision maker. The United States does not have such a set of criteria; Nebraska does, but could change or abolish them.

no longer in the case. Petitioners apparently seek review of only two aspects of the court of appeals' procedural holding: that contend that the parole authorities need not grant a personal hearing at the first possible opportunity in every case and that the statement of reasons for denial need not summarize the facts on which the Board relied (Pet. 10-12).

If, as respondents may contend, parole officials should use, in giving initial consideration to parole release, the same procedures established by *Morrissey* v. *Brewer*, *supra*, for parole revocation, then the judgment of the court of appeals should be affirmed in all respects. We believe, however, that the *Morrissey* procedures should not be applied to parole release. Three things set the revocation of parole apart from applications for the grant of parole, and they call for different procedures.

First, those who seek release on parole are prisoners. The hearings are held within prison walls. Consequently, all of the considerations identified by the Court in *Wolff* v. *McDonnell*, *supra*, and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), are in play here. The calling of witnesses, the use of counsel, the confrontation of persons giving adverse evidence, all may undermine the relationship between prisoner and jailer that is essential to successful management of what may be a tense and hostile environment. Sometimes hearings may set the stage for violence. The Court held in *Wolff* and *Baxter* that, in light of these and other considerations, prison disciplinary hearings need not involve counsel, confrontation, or live wit-

nesses, even though the hearings might lead to decisions that would affect the length of confinement. The same principles apply here.

Second, parole is revoked only because of identifiable misconduct. A revocation hearing involves "charges," and the parolee must have an opportunity to meet those charges. Applications for release on parole, to the contrary, do not involve charges of misconduct. There is no clearly defined question that is to be proved or disproved. The vague criteria in the Nebraska statute (see pages 7-8, *supra*), may call for simply a discretionary assessment of non-verifiable beliefs. A denial of parole cannot be "erroneous" in the same sense that the revocation of parole could be. Because the release decision does not turn on particular facts, it is not well suited to trial-type procedures. The paroling decision comes much closer to the judicial decision concerning the length of sentence to be imposed in the first instance. The sentencing decision traditionally has been made after informal inquiries rather than a trial-type hearing. See generally *United States* v. *Grayson*, No. 76-1572 (June 26, 1978); *Gardner* v. *Florida*, 430 U.S. 349 (1977). It is difficult to see why the Constitution would require for parole decisions procedures more elaborate than it requires for sentencing decisions.

Third, because the procedural requirements of the Due Process Clause depend on a careful balancing of the relevant interests (see *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)), it is significant that a prisoner who applies for parole is seeking liberty,

rather than trying to avert its loss. A parolee whose freedom is withdrawn is bound to feel the loss much more acutely than will a prisoner who simply is turned down in his request to be released. As the Court put it in *Morrissey*, *supra*, 408 U.S. at 482 n.8, "'[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.'"

We therefore submit that *Morrissey* is not an apt model of the procedures to be used in considering applications for parole. The court of appeals also reached this conclusion; it selected *Wolff* as a model, apparently because *Wolff* involved a decision (the revocation of accumulated good-time credits) that would affect the length of imprisonment. The court of appeals apparently concluded that the paroling decision is no less important and should be accompanied by procedures equally likely to avert unwise or uninformed decisions.

There is much to be said for that view. As we have discussed above, the federal Parole Commission uses procedures that in many respects are more elaborate than those spelled out in *Wolff*. But we submit that the second consideration that distinguishes this case from *Morrissey* (see page 40, *supra*) also distinguishes it from *Wolff*. An application for release on parole does not involve charges of misconduct. The questions that influence the release decision are not susceptible of objective proof in most instances. For

example, the question whether a prisoner's "release would depreciate the seriousness of his crime or promote disrespect for [the] law" (Neb. Rev. Stat. § 83-1,114(1)(b) (1976)) cannot be proved by evidence. It is a question similar to that asked by a judge at sentencing, and it should be resolved by the same procedures that are used at sentencing.[20] We therefore agree with petitioners that the court of appeals erred in identifying the nature of the requirements that the Due Process Clause requires to be followed in considering applications for parole in Nebraska.

The court's requirement of an oral hearing, in every case, on the first occasion of parole eligibility will require at least some hearings that serve no significant purpose. Parole authorities usually can identify at least some cases in which hearings would be pointless; cases in which prisoners have committed additional crimes while in prison, or in which they have received unusually short sentences for serious crimes, would be among those in which release at the earliest possible opportunity is so unlikely that a hearing could be nothing but an empty formality.[21]

[20] Cf. *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978) (although the Due Process Clause applies to the academic dismissal of a medical student, it does not require the use of any particular procedures in light of the subjective nature of the inquiry that is made by the faculty).

[21] The question whether a prisoner had committed a crime or disciplinary infraction in prison may already have been the subject of a criminal trial or a *Wolff* hearing. Parole authorities would not be required to hear the evidence anew. *Morrissey*, *supra*, 408 U.S. at 490 ("[o]bviously a parolee cannot relitigate issues determined against him in other forums").

The Due Process Clause does not require the state to conduct a charade in these cases, and it therefore should be accorded the opportunity to follow some more flexible procedure.[22]

Nebraska reviews the file of each prisoner yearly to determine the likelihood of parole release. Whenever there is a significant chance of release, the State holds a formal hearing at which the inmate is entitled to be present and present evidence. The prisoner apparently can contribute written materials to the file review. This system, if fairly administered, is a constitutionally permissible screening device that holds to a minimum the number of unnecessary oral hearings. A prisoner who has been identified, on the

[22] The federal courts that have found a constitutionally protected interest in the parole release process generally have held that informal procedures are sufficient to satisfy the requirements of the Due Process Clause. See, *e.g.*, *Franklin* v. *Shields*, *supra*, 569 F. 2d at 801 ("the only explicit constitutional requisite is that the Board furnish to the prisoner a statement of its reasons for denial of parole"); *Garcia* v. *Board of Parole*, 557 F.2d 100 (7th Cir. 1977) (general statement of reasons relying on the severity of the offense is an adequate explanation for denial of parole); *Williams* v. *Ward*, 556 F.2d 1143 (2d Cir.), pet. for cert. dismissed, 434 U.S. 944 (1977) (no general need for parole authorities to disclose evidence); *Hill* v. *Attorney General of the United States*, *supra* (general explanation of the Parole Commission's salient factor scores and guideline system is sufficient); *Ganz* v. *Bensinger*, 480 F.2d 88 (7th Cir. 1973) (no need to provide a lawyer at public expense). But see *Drayton* v. *McCall*, *supra* (recission of a parole date before release requires all procedures identified in *Wolff* plus pre-hearing disclosure of evidence, a right to call witnesses, cross-examination of all witnesses, and a right to counsel).

basis of a file review, as an unlikely candidate for parole does not lose much, if anything, by being denied an oral hearing. There seems to be little chance of an "erroneous" deprivation; the circumstances that call for postponing an oral hearing (*e.g.*, the commission of serious offenses while in prison or the receipt of an unusually low sentence, so that parole eligibility comes too soon for serious consideration to be given to release) are objective and capable of accurate resolution in written proceedings.[23] Cf. *Richardson* v. *Perales*, 402 U.S. 389, 407 (1971); *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344. It may be that a very few persons, although identified by written proceedings as unlikely to be paroled, nevertheless could use an oral hearing to persuade parole authorities to grant early release, but this possibility does not require that an oral hearing be held in every case.[24] "[P]rocedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344.

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[23] Indeed, as the Court observed in *Moody* v. *Daggett*, *supra*, 429 U.S. at 89, a prisoner may have much to gain by deferring his consideration for parole. Forcing parole authorities to hold hearings at the earliest possible date—as the court of appeals has done—could "deprive the parole authority of vital information" and lead to a decision that "would often be foreordained" (*ibid.*).

[24] If a prisoner should contend that evidence would be lost during a delay, he could make the argument initially in writing, and a hearing then might become appropriate. See *Moody* v. *Daggett*, *supra*, 429 U.S. at 88 n.9.

We also believe that the court of appeals has required too much in the statement of reasons for denying parole. We have no quarrel with the proposition (Pet. App. 21) that a full statement of reasons and a summary of the evidence relied on may relieve "frustration" on the part of some inmates, but that relief is not a necessary part of due process. Judges need not state reasons when imposing sentence,[25] and although the lack of a summary of evidence to accompany a statement of reasons may be frustrating, it is not unconstitutional.

We acknowledge that a requirement of a statement of reasons has become an accepted part of due process safeguards. See, *e.g.*, *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 564-565. But the court of appeals' expansion of that requirement into a constitutional compulsion of a summary of the evidence in a case like this one is unsupported. Because many of the criteria that lead to a denial of parole are subjective assessments of the prisoner's personality and of the crime he committed, there may be little or no "evidence" in the traditional sense. Or it may be that parole authorities follow guidelines indicating an expected range of time to be served for particular offense and offender combinations; in that event the only "evidence" that would explain a decision to deny parole before the guideline range would be that nothing in the prisoner's case

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[25] See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424 (1974).

was out of the ordinary.[26] In still other cases the parole authorities may rely on evidence from confidential sources; so long as this reliance is permissible, the Constitution does not require the evidence to be summarized. It is enough that the evidence can be found in the record. Cf. *Arizona* v. *Washington*, 434 U.S. 497, 516-517 (1978) (state trial judge need not summarize the considerations that led him to declare a mistrial, so long as the record as a whole discloses the basis for the decision).

Perhaps the court of appeals' requirement of a summary of the evidence means no more than that parole authorities must indicate the sort of considerations that influenced their decision; we would not object to such a reading of the Due Process Clause. But if the requirement means more than that, it exceeds the requirements of the Constitution.[27]

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[26] See *Garcia* v. *Board of Parole, supra; Hill* v. *Attorney General, supra.*

[27] The court of appeals gave three reasons—in addition to its reference to "frustration," which is discussed in the text—for its requirement of a statement of reasons and a summary of the evidence. It asserted that this requirement would assist in judicial review, compel members of the board to think about each case, and allow the development of a body of precedent. Pet. App. 21-22. None of these reasons withstands scrutiny.

The court of appeals' statement that reasons and a summary of evidence will assist "judicial review in those situations where it is allowed" may amount to an assertion that such review is "allowed" in the federal courts. That would be incorrect. Cf. *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976) (no judicial review of state decisions for mere error). If the court was referring, instead, to review in the state courts, then there is no reason for the imposition of the requirement. State courts are competent to determine what is necessary for their own review; the Constitution does not compel state courts to have records more complete than those courts believe is necessary. The court's second reason—that a statement of reasons will compel board members to think—is based on the unsupported proposition that they now do not think. At all events, this reason would pertain only to a requirement of a statement of reasons; it would not compel a summary of the evidence. The court's final reason—that reasons contribute to the establishment of a body of precedent—rests on the unarticulated premise that the Constitution requires the establishment of a body of precedent. We know of no support for such a premise; certainly federal judges routinely announce sentences without resort to a body of precedent on that subject. Once more, however, even on its own terms the court of appeals' analysis supports only a requirement of a statement of reasons, not a requirement of a summary of the evidence.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings consistent with the opinion of this Court.

Respectfully submitted.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-201

JOHN B. GREENHOLTZ, Chairman of the Nebraska Board of Parole, *et al.*,

Petitioners,

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE NATIONAL PRISON PROJECT of the AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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TABLE OF CONTENTS

CITATIONS

Cases:

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of the
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INTEREST OF AMICUS CURIAE

The National Prision Project of the American Civil Liberties Union Foundation, Inc. is a non-profit, tax-exempt New York corporation engaged in efforts, through staff attorneys and other employees, to develop rehabilitative correctional programs and facilities, to devise model prison procedures and regulations, to improve prison conditions in the United States and to function as a national resource center for law-

yers, legislators, corrections officials and courts. It is the larges project of its kind in the country.

In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions throughout the country. The Project has been involved as counsel or as *amicus* in many important parole cases, *e.g., Scott v. Kentucky Parole Board,* 429 U.S. 60 (1976) (remanded to consider mootness), *reaffirmed sub nom. Bell v. Kentucky Parole Board,* 556 F.2d 805 (1977), *cert. denied,* 434 U.S. 960 (1978), as well as other due process and related prison cases, *e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Montanye v. Haymes,* 427 U.S. 236 (1976); *Pell v. Procunier,* 417 U.S. 817 (1974); *Preiser v. Rodriguez,* 411 U.S. 475 (1973); *Pugh v. Locke,* 406 F. Supp. 318 (M.D.Ala. 1976), *aff'd and remanded, sub nom. Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977), *cert. den. in relevant part, sub nom. Alabama v. Pugh,* __ U.S. ___ , 98 S.Ct. 3057 (1978).

SUMMARY OF ARGUMENT

Amicus Curiae, the National Prison Project, agrees with the position taken by the United States in their brief as *amicus curiae* that Nebraska law gives prisoners eligible for parole a legitimate claim of entitlement to release (Brief of the United States, pp. 31-36) and that the Due Process Clause requires Nebraska parole officials to give prisoners a fair opportunity to be considered for parole. (Brief of the United States, pp. 38-46). We do not agree with the limitations on the nature of the process due which are argued by the United States.

However, in the light of the inferences in the brief for the Petitioners that the State of Nebraska could or would

amend their parole statutes if this Court were to affirm the holding that the State of Nebraska had created a prisoner entitlement and liberty interest in applications for parole release,[1] we will limit our brief to the contention that, given the present realities of the parole release process, that process implicates interests in liberty protected by the Due Process Clause of the Fourteenth Amendment. Therefore, these important interests should be protected in the manner set forth by this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Wolff v. McDonnell,* 418 U.S. 539 (1974) irrespective of a state created entitlement.

ARGUMENT

PAROLE RELEASE PROCEEDINGS IMPLICATE INTERESTS IN LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The realities of the parole release process.

Since *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969) (due process before garnishment of wages), this Court, in an almost unbroken line of cases, has applied the safeguards of the Due Process Clause to a host of situations where liberty and property interests formerly thought to be exempt from constitutional protection were threatened by unchecked government action. See, *e.g. Goss v. Lopez,* 419

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1 ". . . , Nebraska would at least have had an opportunity to cure the situation by amending its statute." (pet. Br. p. 18).

"If forced into such a position we suspect that many states will simply do away with discretionary parole, and opt for fixed sentences." (Pet. Br. p. 36).

U.S. 565 (1975) (due process before school suspensions); *Taylor v. Hayes*, 418 U.S. 488 (1974) (due process before contempt citation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearings); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (due process before state-assisted repossession); *Bell v. Burson*, 402 U.S. 535 (1971) (due process before suspension of driver's license); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process before public posting of name forbidding individual from purchasing liquor); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process before termination of welfare benefits). Although the content of the prescribed protections has been held to vary from case to case, each recognizes the quintessential value of procedure in our system of government, "for it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). Implicit in these decisions is a respect for the individual adversely affected by important decisions of governmental bodies and a healthy concern over the integrity of the decisionmaking processes employed by the multitude of agencies wielding government power. As one influential commentator has observed in a context directly relevant to this case:

> "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from tradition to accept for a defined class of persons, even criminals, a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power and through processes which deprive them of an opportunity to be heard on the matters of fact and policy which are relevant to the decisions made." Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 923 (1962).

In the administration of correctional justice, the general area of concern in this case, the principles animating the extension of due process in the recent cases of this Court have been solidly rooted. "There is no iron curtain drawn between the Constitution and the prisoners of this country. [T]he position [that] implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause [is] plainly untenable." *Wolff v. McDonnell*, 418 U.S. at 555-56. See also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973): *Morrissey v. Brewer*, 408 U.S. 471 (1972). Yet in spite of these recent developments, one major area thus far has remained immune from this Court's scrutiny: the parole release process, which has been accurately described by the House Judiciary Committee in its Report on the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4201 *et seq.*:

> "The parole system has long been recognized as the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map."
>
> – H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 3 (1975)

It is the overwhelming sentiment of careful observers of parole release decisionmaking that parole boards, as they currently function in most jurisdictions, are "one of the last bastions of unchecked and arbitrary power in America." California Assembly's Select Committee on Administration of Justice, *Parole Board Reform in California – Order Out of Chaos* 15 (1970). A respected federal judge has described the system as one in which "parole officials carry on for the most part the motif of Kafka's nightmares." Frankel, *Law-*

lessness in Sentencing, 41 U. Cin. L. Rev. 1, 15 (1972). A number of national task forces, study commissions, and observers who have reviewed the performances of parole boards have reached conclusions substantially similar to the one voiced by the subcommittee of the House Judiciary Committee:

> "Everywhere the Subcommittee went they found universal dissatisfaction with the parole process. Wardens claimed that it was a major cause of institutional tension. Inmates felt that they were being treated inequitably. Judges felt that discrepancies within the system made a mockery of the sentencing process." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 2 (1975).

See also National Advisory Commission on Criminal Justice Standards and Goals, *Corrections,* 389-435 (1975); Citizens' Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls: Report on New York Parole,* passim (1975); Official Report of the New York State Commission on Attica, *Attica,* 93-102 (1972),[2] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 85-86 (1967); D. Stanley, *Prisoners Among Us: The Problem of Parole,* passim (The Brookings Institution, 1976); K. Davis, *Discretionary Justice* 126-41 (1969); F. Cohen, *The Legal Challenge to Corrections* 26-63 (1969); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology,* 22 Am U.L. Rev. 477 (1973); Parsons-Lewis, *Due Process in Parole-Release Decisions,* 60 Calif. L. Rev. 1518 (1972); Bixby, *A New Role for Parole Boards,* 34 Fed. Prob. 24 (June 1970).

[2] Compellingly, the Attica Commission pinpointed the parole release procedures followed by the New York State Board of Parole as one of the central causes of inmate frustration and unrest leading to the tragedy at Attica: "[A]s presently operated, parole procedures are unfair, and appear to inmates to be even more inequitable and irrational than they are." Id at xviii.

Embodied in a *realistic* concept of parole are three relevant elements. First, as the former Chairman of the U.S. Board of Parole has noted, "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?* 39 Fed. Prob. 42, 47 (June 1975). "[T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence . . . parole legislation involves essentially a delegation of sentencing power to parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967). In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole Release Decisions,* 60 Cal. L. Rev. 1518, 1534 (1972). "Parole occupies a central role in the sentencing and correctional system. Once an offender is sentenced to prison, it is largely the parole board which determines when he will be released, under what conditions, and whether his conduct under supervision warrants imprisonment." *Abolish Parole?* Summary of Report Submitted to the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, at 1 (September 1978).

Second, release on parole is not an exceptional stroke of good fortune, saving a few prisoners from serving their full term. In 1976, 69% (approximately 96,000 individuals) of

all those released from prison were released on parole, a figure which has steadily increased since 1966. In 1977, approximately 109,700 prisoners were released from prison in this country through the parole process, another substantial increase.[3] "Parole is the predominant mode of release for prison inmates today, and it is likely to become even more so." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 389 (1973).

Third, parole release is not "leniency". Studies have shown that "actually prisoners serve as much time in confinement in jurisdictions where parole is widely used as in those where it is not." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 62 (1967). According to a recent survey, the great majority of federal judges consider parole in sentencing and approximately one-half sentence on the assumption that the prisoner will be released after serving one-third of it. Two-thirds of the judges said that they expected sentenced defendants to be released before serving the maximum sentence imposed. Project, *Parole Release Decision Making and the Sentencing Process,* 84 Yale L.J. 810, 882 n. 361 (1975). Thus, "today . . . the legal maximum is not considered the norm. Parole . . . should not be considered any more a matter of grace than any sentence which is less than the maximum provided for by statute." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967).

One additional aspect of parole release decision-making, apparently relied on by the Petitioner and the United States

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[3] *Parole in the United States: 1976 and 1977,* Uniform Parole Reports, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, July 1978, pp. 11, 40.

for excluding any of the strictures of minimum due process from the confines of the parole hearing, deserves some comment. Their apparent argument that due process would unduly intrude upon the discretionary and predictive judgments made by parole boards, conflicts with the operative (as opposed to espoused) factors motivating parole release decisions and with prior decisions of this Court rejecting regimes of unbridled discretion exercised under the guise of benevolent expertise. See *Morrissey v. Brewer, supra* at 483.

As recognized by Professor Kadish, the argument that legal rules will only operate to impair the reliability of expert judgment is without proper foundation for five reasons:

(1) The goal of rehabilitation– a main tenet of parole release decisionmaking – is not exclusive in our society. "Reverting to elementary principles for a bit, we ought to recall that individualized justice is *prima facie* at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law." M. Frankel, *Criminal Sentences: Law Without Order,* 10 (1973);

(2) Expert judgment contains premises and assumptions that deserve challenge and careful scrutiny;

(3) The decision to release a prisoner is often predicated on reasons unrelated to rehabilitation, *e.g.,* prison overcrowding. See *New York Times,* January 5, 1976, at 1, Col.2 (city ed.) (at least six southern states are releasing prisoners on parole because of prison overcrowding);

(4) Correctional judgments turn on matters of historical fact (*e.g.,* the nature and number of past arrests, employment status, etc.) as well as scientific ones; and

(5) Overburdened parole boards, like other government agencies, commit errors. Kadish, *Legal Norm and Discretion*

in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 924-28 (1962).

The insight into "the function of parole in the correctional process" with which the Chief Justice began the opinion in *Morrissey* neatly sums up the discussion of the realities of the parole system, and provides a logical point of departure in analyzing the nature of the prisoner's interest in parole release:

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. . . . Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison." 408 U.S. at 477.

B. The nature of a prisoner's interest in parole embodies real substance: Parole is not a condition of confinement.

Unlike the situation in *Meachum v. Fano,* 427 U.S. 215, 224 (1976), where "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the state may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution", the issue in this case is not where or how, but whether that person shall be imprisoned.

A prisoner considered for parole will either continue to be imprisoned and deprived of his freedom or conditionally released and permitted to resume a role in the larger society. Thus, unlike in *Meachum,* the issue at the parole release hearing is liberty, and that liberty is protected by the Due Process Clause of the Fourteenth Amendment.

This Court said in *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972); "The liberty of a parolee, although indeterminate, includes many of the core values of unqualifed liberty . . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." Comparing the parole revocation decision to parole release, the Second Circuit Court of Appeals said that, "the stakes are the same: conditional freedom versus incarceration." *U.S. ex rel. Johnson v. Chairman, New York State Board of Parole,* 500 F.2d 925, 928 (2d Cir.), *vacated as moot,* 419 U.S. 1015 (1974). While the degree of hardship imposed by the denial of parole and the revocation of parole may differ, the nature of the interests involved are identical. Any difference between the grant and revocation of parole would affect the degree of the procedural protection to be accorded, but not the applicability of the Due Process Clause.

This Court recognized in *Moody v. Daggett,* 429 U.S. 78 (1976), that the denial of this liberty is the factor in parole revocation cases which implicates the Due Process Clause. Because the petitioner in *Moody* could not gain release by the process which he sought, he had no right to an immediate hearing. "With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which *Morrissey* sought to protect." *Id.* at 87. In contrast, the parole authority "holds the key to the lock of the prison." *Childs v. U.S. Board of Parole,* 511

F.2d 1270, 1278 (D.C. Cir. 1974). The Senate Judiciary Committee recognized that "the denial of parole is in a limited sense the taking of an individual's liberty, or at least the opportunity for him to obtain liberty. The Constitution requires due process of law. . .". S. Rep. 94-369, 94 Cong., 1st Sess. 19 (1975).

A person eligible for parole, like a person subject to parole revocation, will either be imprisoned or have some measure of conditional freedom. Liberty is precisely what is at stake, and that liberty must be afforded the protection of the Due Process Clause of the Constitution.

CONCLUSION

For the foregoing reasons, the judgement of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 78-201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

JOHN B. GREENHOLTZ, CHAIRMAN OF THE NEBRASKA BOARD OF PAROLE, ET AL.,
Petitioners,

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JEROME N. FRANK LEGAL SERVICES ORGANIZATION AND THE PLAINTIFF CLASS IN *CHILDS* v. *UNITED STATES BOARD OF PAROLE*, 511 F.2d 1270 (D.C. Cir. 1974), AS AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes and Rules:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE AMICI CURIAE

This case presents the questions whether and to what extent the Due Process Clause applies to proceedings to determine whether a prisoner should be released on parole. This case particularly concerns the Nebraska parole system. This Court's decision, however, will necessarily affect the constitutional rules governing the operation of all state and federal parole systems.

A. The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale Law School. LSO coordinates student legal assistance programs for individuals who could not otherwise obtain legal services. LSO provides services for prisoners at the Federal Correctional Institution at Danbury, Connecticut, state prisoners in Connecticut's penal institutions, and mental patients at Connecticut Valley Hospital. Since its founding in 1970, LSO's Danbury Project has counselled over 3,000 inmates, making it one of the most extensive programs of legal assistance for federal prisoners in the country. Many of the cases involve representation of inmates before the United States Parole Commission. LSO's attorneys and law students have developed considerable expertise with the procedures mandated by the Parole Commission and Reorganization Act (18 U.S.C. § 4201 *et seq.*) and the Parole Commission's regulations promulgated under the new parole statute (28 C.F.R. §2.01 *et seq.*).[1]

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[1] LSO's representation of state and federal prisoners has resulted in extensive litigation to secure its clients' rights. Representative reported decisions include: *Drayton* v. *McCall*, No. 78-2030 (2d Cir. Oct. 2, 1978) *modifying* 445 F.Supp. 305 (D.Conn. 1978); *Ron* v. *Wilkinson*, 565 F.2d 1254 (2d Cir. 1977); *Holup* v. *Gates*, 544 F.2d 82 (2d Cir. 1976), *cert. denied*, 430 U.S. 941 (1977); *United States* v. *Salerno (Silverman)*, 538 F.2d 1005, *clarified on denial of rehearing*, 542 F.2d 628 (3d Cir. 1976); *Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975); *Grasso* v. *Norton*, 520 F.2d 27 (2d Cir. 1975); *Rhodes* v. *U.S. Parole Com'n*, 456 F.Supp. 17 (D.Conn. 1977); *Toomey* v. *Young*, 442 F.Supp. 387, 449 F.Supp. 336 (D.Conn. 1977), *appeal pending; Green* v. *Nelson*, 442 F.Supp. 1047 (D.Conn. 1977); *Dumschat* v. *Board of Pardons, State of Conn.*, 432 F.Supp. 1310 (D.Conn. 1977); *Moskowitz* v. *Wilkinson*, 432 F.Supp. 947 (D.Conn. 1977); *Williams* v. *United States Board of Parole*, 383 F.Supp. 402 (D.Conn. 1974); *Chesney* v. *Adams*, 377 F.Supp. 887 (D.Conn. 1974), *aff'd mem.*, 508 F.2d 836 (2d Cir. 1975); *Battle* v. *Norton*, 365 F.Supp. 925 (D.Conn. 1973). In addition, LSO has appeared as *amicus curiae* in *Weinstein* v. *Bradford*, 423 U.S. 147 (1975), and *United States* v. *Slutsky*, 514 F.2d 1222, 1226-30 (2d Cir. 1975).

In conjunction with the Daniel and Florence Guggenheim Foundation, LSO has sponsored two major academic projects concerning the parole system. During the 1974-75 academic year, the Yale Law School offered a Parole and Sentencing Workshop. Members of this Workshop authored a book evaluating the federal sentencing and parole system. *See* P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977). Many of the authors' proposals have been incorporated in the proposed revisions of the federal criminal code passed by the United States Senate. *See* S. 1437, Ch. 20 & 58, 95th Cong., 1st Sess. (1978). The other LSO academic project was the first major empirical and theoretical study of the reformed federal parole procedures and "guidelines" and the impact of these reforms on judges and the federal sentencing scheme. *See* W. Genego, P. Goldberger, and V. Jackson, *Project, Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975) (hereinafter "Project").

B. The Plaintiff Class in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974), comprises some 90 named federal prisoners representing all those eligible for parole consideration under Title 18 of the United States Code. The *Childs* litigation commenced in 1970 with the filing of a *pro se* complaint challenging the parole release procedures of the then United States Board of Parole as contrary to the Due Process Clause. The District Court appointed counsel from the undersigned firm of Williams & Connolly.

In 1973 the District Court held that the Parole Board must give reasons for parole denial and develop due process procedures for parole release decisions. *Childs* v. *United States Board of Parole*, 371 F.Supp. 1246 (D.D.C. 1974). The Court of Appeals affirmed the holdings that parole release proceedings implicate the Due Process

Clause and that reasons for denial of parole must be given. The Court of Appeals vacated and remanded for further consideration, in light of developments subsequent to the entry of the District Court's opinion, the portion of the order requiring that procedures be developed for prisoners' access to information which the Parole Board reviews in making its release decision. Remand proceedings on the access issue are still pending. In particular, this continuing litigation involves the extent to which the Parole Commission's regulations comply with the Parole Commission and Reorganization Act and the Due Process Clause.

The potential impact of the decision in this case is recognized in the *amicus curiae* briefs filed by the Solicitor General and by the Attorneys General of the States of Oklahoma and California. The *amici curiae* submitting this brief have broad experience with parole policies and practices throughout the country. The purpose of this *amici curiae* brief is to present additional information, based largely on experience of the *amici* in representing federal prisoners, that will provide the Court a more complete picture of the interests at stake.

Both parties have consented to the filing of this brief.

STATUTES INVOLVED

This case involves the Nebraska parole statutes. These provisions are set forth in the Brief for the Petitioners at 2-7. This case also has implications for the federal parole system. The pertinent provisions of the Parole Commission and Reorganization Act (18 U.S.C. § 4201 *et seq.*), and the regulations of the United States Parole Commission (28 C.F.R. § 2.01 *et seq.* (1977)) are reprinted in Appendix A of this Brief.

SUMMARY OF ARGUMENT

I.

The questions presented in this case—whether and to what extent the Due Process Clause applies to proceedings to determine whether a prisoner should be released on parole—affect the lives of almost 300,000 persons incarcerated in state and federal institutions. The impact of this decision will be felt in the cells of the nation's prisons in perhaps a more profound manner than any previous decision of this Court in the area of corrections. It is in this very realistic sense that prisoners are vitally concerned whether the Constitution extends to the deliberations of parole boards.

Prisoners have an interest in their eventual release on parole of sufficient magnitude to come within the traditional constitutional protection of "liberty." Whether this interest is characterized as a substantial expectation of release based on the importance of parole in the correctional process or as a state-created right, it is imperative that the discretionary authority to deny parole not be arbitrarily exercised. Every state and the federal government have established some form of parole release system. Of all prisoners annually returned to the community, 70 percent are released on parole. "Rather than being an ad hoc exercise of clemency, parole is [therefore] an established variation on imprisonment of convicted criminals." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972).

The decisions of this Court finding no inherently protected liberty interest in the conditions of continued confinement do not apply to the parole release process. Parole involves whether—and not where or how—a person shall be imprisoned. Unlike an altered condition of confinement involving no prospect of immediate release, the opportunity for liberty offered by parole release is

not "too ephemeral and insubstantial to trigger procedural due process protections . . . ." *Meachum* v. *Fano*, 427 U.S. 215, 228 (1976).

Parole release and parole revocation are indistinguishable for constitutional purposes. The nature of the affected individual's interest in both decisions is identical: conditional freedom versus incarceration. The prisoner and parolee both "face a potential of substantial imprisonment." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 480. This common interest in liberty, however denominated, is within the protection of the Due Process Clause.

This conclusion is also dictated by the holding in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), that a prisoner has a protected liberty interest in the loss of good time credits where the State has created an entitlement to such a length-of-confinement-reducing benefit. The prisoner's chances for immediate release are not implicated by the forfeiture or withdrawal of good time credits. Nevertheless, the Court in *Wolff* concluded that the threat to liberty was sufficiently great to require constitutional protection. It would thus be incongruous to hold that the prospect of immediate release by means of parole is not likewise a sufficient liberty interest to be protected by the Due Process Clause.

Petitioners and the United States argue that minimal due process safeguards are not required in the parole release process because the determination involves the exercise of discretion. This contention was expressly rejected by the Court in *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 483. It is simply absurd to suggest that the more unexposed, unbridled, and unreviewable discretion in an administrative process, the more immune it becomes from even the most rudimentary procedures designed to promote fairness.

The attempts of the United States to distinguish the federal and most state parole systems from the Nebraska

scheme are unavailing. The Solicitor General concedes that the Nebraska parole laws create "an expectation that the state may not disappoint without following procedures required by the Due Process Clause." Brief for the United States at 36. He further acknowledges that the Nebraska parole laws permit "a number of more diffuse and discretionary criteria [to] be invoked to deny early release on parole." *Id.* at 35. The Solicitor General then proceeds to make the assertion that "the United States and most of the states employ . . . a discretionary system . . . under which the parole decision is committed to the *unfettered discretion* of the parole authorities." *Id.* at 21 (emphasis added). This claim is not supported by any citation to federal or state law. The explanation for this omission is readily understandable.

First, the federal parole statute is almost identical to the Nebraska legislation in three critical respects. Second, as demonstrated by the Survey of Federal and State Parole Laws prepared by *amici* and reproduced in Appendix B, Congress and the legislatures of 47 states have prescribed standards, criteria, or factors to guide the paroling authority in making parole release determinations. Under the Solicitor General's own analysis, a legitimate claim of entitlement exists in the federal and virtually all state parole systems because the government "has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings . . . ." Brief for the United States at 29.

II.

The prisoner's interest in freedom requires that at least four general procedures be mandated for parole release determinations. *Amici* believe, on the basis of experience with state and federal parole processes, that the following rights are essential to fair decisionmaking:

an effective hearing; a decision based on accurate information; a statement of reasons for parole denial; and an adequate record of the proceeding.

As shown by the survey of parole laws conducted by *amici*, many states currently provide some of these procedures. All these rights have been required in the federal parole system since the passage of the Parole Commission and Reorganization Act. They have proven to be effective and manageable. These federal safeguards deserve careful scrutiny in fashioning constitutional rules for the operation of parole systems.

The procedures mandated for parole revocation in *Morrissey* and for loss of good time credits in *Wolff* have not jeopardized the orderly administration of parole systems or prisons. The proposed procedures for parole release decisionmaking likewise will not unduly burden the parole process. These safeguards strike a reasonable balance between the legitimate interests of prisoners in fair decisions and the understandable need of parole boards for feasible methods of operation.

ARGUMENT

I.

THE DUE PROCESS CLAUSE APPLIES TO THE PAROLE RELEASE DECISION

Prisoners have an interest in their eventual release on parole that comes within the constitutional protection of "liberty." Release on parole is no "mere anticipation or hope of freedom," *Morrissey* v. *Brewer*, 408 U.S. 471, 482 n.8 (1972) quoting *United States ex rel. Bey* v. *Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971).[2] Rather, it is a fundamental and integral part of the correctional system, of enormous value to both the inmate and the state.[3]

The discretionary nature of the decision to release, like the discretionary decision whether to revoke, affects liberty in a sufficiently important way to invoke appropriate procedural protections. Indeed, the interest at stake in the parole release hearing is not constitutionally distinguishable from the valuable liberty this Court sought to protect in *Morrissey*. As Judge Fahy observed in *Childs* v. *United States Board of Parole, supra*, 511 F.2d, at 1278:

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[2] *Bey* relied exclusively on *Menechino* v. *Oswald*, 430 F.2d 403 (2d Cir. 1970), for this characterization. This dictum has been expressly rejected by the Second Circuit in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 927-28 & n.2 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974). It has also been rejected by most other Circuits. *See* Brief for United States at 33-34 n.18.

[3] In dissenting from the remand for consideration of mootness in *Scott* v. *Kentucky Parole Board*, 429 U.S. 60 (1976), Justice Stevens noted that the:

> "manifest importance [of parole] is demonstrated by (a) the vast number of parole release decisions that are made every year; (b) the importance of each such decision to the person affected by it; and (c) the extensive litigation, with varying results, which has developed in the federal courts." 429 U.S. at 61 n.1.

"The Board [of Parole] holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a 'grievous loss' or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimal standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities."

A. Parole Is A Fundamental, Necessary Component Of The Correctional System, Not A Unilateral Hope Of Prisoners

This Court and others have recognized that the parole release decision is one of the most significant parts of an entire process which our political and social institutions have evolved for dealing with convicted persons. *Morrissey* v. *Brewer*, 408 U.S. 471, 477-80 (1972). For a variety of reasons, parole has come to be essential to the administration of post-conviction justice. The widespread, systematic reliance on parole release means that for most prisoners, in most states, the parole release decision is at least as important as the sentencing decision in determining how long they will be incarcerated. As the Attica Report attests, "[i]n practice, the Parole Board—not the judge—decides how long an inmate will serve time." *The Official Report of The New York State Special Commission on Attica* 93 (Bantam ed. 1972).[4]

[4] "Parole is an extension of the sentencing process. . . . The final determination of how much time an offender must serve is made by the parole authority." S. Rep. No. 94-369, 94th Cong., 1st Sess. 15-16 (1975).

The interest prisoners bring to the parole decision, therefore, is no "unilteral expectation" or "hope." In the parole decision, as in sentencing, the person duly convicted of a criminal offense no longer has an unqualified right to liberty. Nevertheless, the accused, whether appearing before a sentencing judge or a parole board, retains a constitutional interest in freedom that requires minimal standards of fair treatment. *See, e.g., United States* v. *Tucker*, 404 U.S. 443 (1972); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Townsend* v. *Burke*, 334 U.S. 736 (1948).[5] As the District of Columbia Circuit has stated, "where the . . . government has made parole an integral part of the penological system, . . . it is also essential that authority to deny parole not be arbitrarily exercised." *Childs* v. *United States Board of Parole, supra*, 511 F.2d at 1280.

Parole is the usual form of release from incarceration. Almost 300,000 prisoners are incarcerated in federal and state institutions. *Corrections Magazine*, June 1978, at 21. One-third of those prisoners are annually released from custody by means of parole. Uniform Parole Reports, *Parole in the United States: 1976 and 1977* 46-47 (1978). Of all prisoners returned to the community each year, parole is the method of release for about 70 percent. *Id.* at 55.[6]

[5] As the Second Circuit found in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 928 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974) (emphasis added):

"[T]he average prisoner, having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a *substantial 'interest'* in the outcome. For him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty."

[6] In deciding that the parole revocation process was subject to certain minimal due process procedures, the Court noted the high incidence of parole revocation.

"[R]evocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35%-45%

[Footnote continued on page 12]

Sentencing judges assume in setting maximum terms that inmates will be released earlier. Many judges have been known to tell the defendant that "you have the key to prison in your pocket." [7] The 1975 Survey of Sentencing Judges conducted by the Yale Law Journal demonstrates the widespread expectation of sentencing courts that prisoners will be released on parole. Two thirds of those experienced federal judges reported that they expected the defendants they sentenced to be released before serving the full term imposed. And nearly half expected release to come immediately upon eligibility. Project, *supra*, 84 Yale L.J., at 882-83, n.361. *See also* A. von Hirsch, *Doing Justice: The Choice of Punishment* 83 (1976).

Parole cannot be characterized as simply an alternative to a pardon, reserved for those few prisoners who may be said to be rehabilitated in prison.[8] "Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972). Parole promotes several important governmental objectives. One such significant goal is the effective functioning of the correctional system: Experience indicates that it is imperative that the process by which the parole

[6] [Continued]
of all parolees are subjected to revocation and return to prison." *Morrissey* v. *Brewer, supra*, 408 U.S. at 479.

[7] *See* Newman, *Forward* to Project, 84 Yale L.J. 810, 812-13 (1975); *id.*, at 882, n. 361, 890 nn. 386-88; *see also Childs* v. *United States Board of Parole, supra*, 511 F.2d, at 1278; *cf. United States* v. *Slutsky*, 514 F.2d 1222, 1229 (2d Cir. 1975).

[8] The force of this argument is greatly diminished by the growing disenchantment with the traditional correctional goal of rehabilitating prisoners through confinement. In fact, the demise of the so-called "medical model" is reflected in the fact that the United States Parole Commission no longer relies upon institutional performance in most cases. *See* P. O'Donnell, M. Churgin and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform*, 27, 47-48, 68-69 (1977).

release decision is made be safeguarded against arbitrary action. In its report accompanying the new federal parole legislation, the Senate Judiciary Committee noted:

> "Parole is perhaps the most important item in the mind of every prisoner because it is his key to the door. *It is essential, then, that parole has both the fact and appearance of fairness to all. Nothing less is necessary for the maintenance of the integrity of our criminal justice institutions.* The openness and sense of fairness that is intended in the provisions of this legislation will have the beneficial effect of allowing the participants in parole—the inmates—to understand their place in the system and to better appreciate what is expected of them." S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

In most states and the federal system, parole and the good-time laws also work hand in hand to keep prison populations down to acceptable levels, to mitigate the harshness of sentences, to minimize unwarranted disparities in sentencing, and, finally, to control prison behavior by offering incentives to discipline and participation in rehabilitative and vocational programs.[9] A system which depended merely on the unfulfilled, unilateral expectations of prisoners could not succeed in these functions. Instead, parole is regarded by inmates, prison administrators and parole officials as a pervasive fact of prison life, a carrot to be waved by rehabilitative staff and a stick to be wielded by guards and other correctional personnel to ensure good behavior.[10]

[9] *See* D. Stanley, *Prisoners Among Us: The Problem of Parole* 3-4 (1976); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U. L. Rev. 477 (1973); Comment, *The Parole System*, 120 U. Pa. L. Rev. 282 (1971).

[10] *See* Hearings Before Subcomm. No. 3 of House Comm. on Judiciary, 92d Cong., 2d Sess., Ser. 15, pt. 7-A, at 483, 493-94

[Footnote continued on page 14]

In most jurisdictions, this system of mutual expectations has been formally set down in statutes, rules or regulations; in a few others, it remains informal. In either system, however, definite and mutual expectations arise that most inmates will be released on parole at some time prior to the expiration of their maximum terms. As the South Carolina Department of Corrections has acknowledged:

> "Where parole is the common, almost universal, method of release from prison it comes to be viewed more often as a right—indeed it is the norm—than where it is granted reluctantly and rarely, and in jurisdictions with long statutory sentences, infrequent use of pardon, and no other alternative to sentence mitigation, parole becomes crucially important to inmates . . . ." South Carolina Department of Corrections, *The Emerging Rights of the Confined* 198 (1972).

Accordingly, the parole release process gives rise to a "state-created right"—a "liberty interest" with "its roots in state law." *Meachum* v. *Fano*, 427 U.S. 215, 226 (1976). *See Franklin* v. *Shields*, 569 F.2d 784 (4th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 1003 (1978) (parole); *Polizzi* v. *Sigler*, 564 F.2d 792 (8th Cir. 1977) (prison classification); *Childs* v. *United States Board of Parole*, *supra*, 511 F.2d at 1281.

B. Parole Is A Form Of Protected Liberty, Not A "Condition Of Confinement"

Recent decisions of this Court provide that a prisoner has no inherently protected liberty interest in the conditions of his continued confinement. In *Meachum* v. *Fano*, *supra*, 427 U.S. at 224 (1976), this Court held:

[10] [Continued]
(1972). In the federal system, an inmate who has forfeited satisfactory good time for disciplinary infractions cannot be granted parole. 28 C.F.R. § 2.29 (1977).

> "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution."

See also Moody v. *Daggett*, 429 U.S. 78, 88 n.9 (1976); *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976).

This case, however, involves not the location or conditions of confinement, but the length of confinement. Stated differently, parole release involves whether—and not where or how—a person shall be imprisoned. This distinction is fundamental to our notions of liberty and due process of law.[11]

The differences between this case and the situations in *Meachum* and other "conditions of confinement" cases are readily apparent. Unlike an altered condition of confinement involving no prospect of immediate release, the chance for freedom offered by parole release is not "too ephemeral and insubstantial to trigger procedural due process protections . . . ." *Meachum* v. *Fano*, *supra*,

[11] The Court suggested this critical difference in *Meachum*. "Confinement in any of the State's institutions is within *the normal limits or range of custody* which the conviction has authorized the State to impose." 427 U.S. at 225 (emphasis added).

The Court also emphasized in *Meachum* that "[o]ur cases hold that the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect. See *Wolff* v. *McDonnell*, 418 U.S. at 556." 427 U.S. at 225.

In *Wolff* the Court announced the following guiding principle:

> "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." 418 U.S. at 555-56.

427 U.S. at 228. Unlike situations where "prison officials have discretion to transfer [a prisoner] for whatever reason or for no reason at all," *id.*, neither Congress nor the state legislatures has authorized parole boards to grant or deny parole on the basis of absolutely unfettered discretion without any prescribed criteria or standards. Unlike the parolee reincarcerated for conviction of new crimes and faced with a parole violator warrant, the denial of parole has a "present" and "inevitable effect upon the liberty interests . . ." of a prisoner. *Moody* v. *Daggett, supra,* 429 U.S. at 87. And unlike a prison official at a good time revocation proceeding, the paroling authority at a release hearing "holds the key to the lock of the prison." *Childs* v. *United States Board of Parole, supra,* 511 F.2d at 1278.

The proper conclusion is dictated by the holding in *Morrissey* v. *Brewer, supra,* that the decision to revoke parole affects a liberty interest protected by the due process guarantee. The interest of a prospective parolee and a parolee facing revocation is, of course, not precisely the same. Common sense suggests a factual difference between the present enjoyment of conditional freedom and a present interest in the likelihood of conditional freedom. The nature of the interest, however, is identical —freedom from incarceration.[12] As the Second Circuit has recognized, "the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra,* 500 F.2d at 928. *See also Inmates of the Nebraska Penal and Correctional Complex* v. *Greenholtz,* 576 F.2d 1274, 1278 (8th Cir. 1978). The prisoner hoping for parole and his former cellmate fearing reincarceration

[12] Any factual differences between the interest of a parolee and prospective parolee affect only the *degree* of procedural protections afforded. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer, supra,* 408 U.S. at 481.

share one critical thing in common: both "face a potential of substantial imprisonment." *Morrissey* v. *Brewer, supra,* 408 U.S. at 480. For each his interest in

> "liberty . . . , although indeterminate, includes many of the core values of unqualified liberty . . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Id.* at 482.[13]

A holding that a prisoner has a constitutionally protected liberty interest in the parole release decisionmaking process follows *a fortiorari* from *Wolff* v. *McDonnell,* 418 U.S. 539 (1974). In *Wolff,* the Court held that a prisoner has a protected liberty interest in the loss of good time credits where the State has created an entitlement to such a length of confinement-reducing benefit. Certainly, "the forfeiture of good time does not immediately deprive a prisoner of his freedom." *Drayton* v. *McCall,* No. 78-2030 at 4915 (2d Cir., Oct. 2, 1978). Nevertheless, the Court in *Wolff* thought the jeopardy to liberty posed by loss of good time—and the concomitant lengthening of confinement—was grave enough to warrant constitutional protection. It would thus be anamolous to hold that the prospect of immediate release by the length-of-confinement-reducing method of parole is not likewise a sufficient liberty interest to be protected by the Due Process Clause.

[13] In passing the Parole Commission and Reorganization Act (18 U.S.C. § 4201 *et seq.*), Congress sought to enact legislation guaranteeing "an infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975). Congress recognized the significance of the outcome for a prisoner.

> "The denial of parole is in a limited sense the taking of an individual's liberty, or at least the opportunity for him to obtain liberty. *The Constitution requires due process of law . . . .*" S. Rep. 94-369, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

C. The Due Process Clause Applies To Expert, Discretionary Decisions Affecting Liberty

The fact that a particular parole decision is not necessarily dictated by any given set of facts does not, as the briefs for the petitioners and United States would have it, extinguish the prisoner's right and need to have evaluations made fairly and, to the extent facts are relevant, accurately. In *Morrissey*, this Court emphatically rejected the notion that a parole board's discretionary authority is inhibited, much less thwarted, by minimum standards of procedural fairness.

> "Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole." 408 U.S. at 483 (footnote omitted).

The failure to provide intelligible explanations for the denial of parole or to afford a reasonable opportunity for the inmate to contribute information and to respond to adverse evidence is at odds with fundamental notions of the way governmental agencies should operate to their own best advantage and to comply with minimal requirements of fairness. *See Wolff* v. *McDonnell*, *supra*, 418 U.S. at 555-58; K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* 126-133 (1969). In countless other areas of public life, administrative agencies empowered to make discretionary judgments are required by law to follow procedures designed to assure that, whatever the decision may be, it has been arrived at fairly and as accurately as possible. Such rules are as compatible with parole release decisionmaking as they are with the decisional process of other federal and state administrative bodies. This was clearly the judgment of Congress in enacting the new federal parole charter providing "an

infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975); *see also* S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975).

The Court's decisions in *Meachum*, *Montanye* and *Moody* are fully consistent with the conclusion that minimum due process protections are compatible with decisions entailing the exercise of discretion. Those cases turned on the absence of a protected interest in liberty, and not on any conclusion that the discretionary administrative process involved could not function effectively with a modicum of due process hearing requirements.[14] None of these decisions disturbs the Court's finding in *Morrissey* that, even though the nature of the decision is largely "a discretionary matter," a "simple factual hearing will not interfere with the exercise of discretion." 408 U.S. at 483.[15]

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[14] The holding in *Meachum* was not predicated on whether the decision was "discretionary." The prison transfer decision in *Meachum* was subject to no standard whatsoever. 427 U.S. at 228 ("discretion to transfer [the prisoner] for whatever reason or for no reason at all."). The Massachusetts legislature had authorized a totally arbitrary administrative scheme—"unbridled discretion" as the Solicitor General suggests. Brief for the United States at 36. As the First Circuit pointed out in a related decision, "[f]reedom from transfer is not a 'liberty interest' since an inmate may be transferred *at the whim* of the Commissioner." *Four Certain Unnamed Inmates of Mass. Correctional Institution at Walpole, Mass.* v. *Hall*, 550 F.2d 1291, 1292 (1st Cir. 1977) (emphasis added); *Tracy* v. *Salamack*, 572 F.2d 393, 395, n.9 (2d Cir. 1978).

[15] The assertion that discretionary determinations are not amenable to due process protections has been flatly rejected by other courts. For example, in *Haymes* v. *Regan*, 525 F.2d 540 (1975), the Second Circuit held that due process must be accorded to a parole applicant notwithstanding the fact that "the Parole Board is invested with vast discretionary authority in deciding whether and when parole release is appropriate." 525 F.2d at 543. Moreover, the Second Circuit added, due process protections might improve the discretionary process. "The task of the reviewing body thus might well be eased by the formulation and promulgation of more precise rules and criteria." 525 F.2d at 543.

On the contrary, a settled line of authority in this Court establishes that minimum due process safeguards may be even more important where the decision is highly discretionary. As Justice Frankfurther pointed out in his landmark concurrence in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 171-72 (1951):

> "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

The logical extreme of the argument advanced by petitioners and the United States is that the more unexposed, unbridled, and unreviewable discretion in an administrative process, the more immune it becomes from even the most rudimentary procedures designed to promote fairness. This contention is an open invitation to this Court " 'to sacrifice good sense to a syllogism'—to find in the [*Meachum*] doctrine an infinite elasticity." *Gertz* v. *Welch*, 418 U.S. 323, 399 (1973) (White, J., dissenting) (footnote omitted). The decisions of this Court long ago repudiated the pernicious notion that, in matters affecting the liberty of a person, a legislative grant of authority to a government decisionmaker—involving "a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached"—confers on that body "a license for arbitrary procedure." *Kent* v. *United States*, 383 U.S. 541, 553 (1966).[16]

[16] "[I]t appears anomalous for the courts to be totally unable to require procedures when the state leaves the decision regarding a benefit to administrative discretion by failing to grant a

[Footnote continued on page 21]

In recent years, numerous studies of state and federal parole systems have prompted calls for sweeping reforms.[17] A constant cause for criticism has been "the existence . . . of discretionary power in the hands of . . . parole boards . . . ." *Struggle for Justice: A Report on Crime and Punishment in America Prepared for the American Friends Service Committee* 124 (1971). In passing the new federal parole statute, the House Judici-

[16] [Continued]

'substantive right,' and to be free to mandate procedures when the state does establish a substantive right and provides rudimentary statutory procedures for the benefit's termination. Why should the courts on the one hand be paralyzed when a state permits its officials to engage in utterly discretionary decision-making, and on the other hand be commissioned with the full power of procedural review when a state improves this situation by crystallizing a substantive right and establishing procedures? Plainly it is absurd to say that total arbitrariness is immune from constitutional attack, while less-than-total arbitrariness must be struck down." Comment, "Two Views of a Prisoner's Right to Due Process: *Meachum* v. *Fano*," 12 Harv. C. R. C. L. L. Rev. 405, 418-19 (1977).

[17] Parole has fallen into such disrepute that a growing number of critics has called for abolition of parole. *See generally*, A. von Hirsch, *Abolish Parole?* (1978); P. O'Donnell, M. Churgin and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* 12-13, 21-28, 68-69 (1977); D. Stanley, *Prisoners Among Us: The Problem of Parole* 186 & n. 45 (1976). After deliberating two years, the prestigious Joint Committee on the Legal Status of Prisoners of the American Bar Association

> "concluded that continued reform at the margin of current sentencing practices is no longer justified and that more substantial changes are in order. Accordingly, the standards propose the abolition of parole as it is currently practiced in most American jurisdictions. The Committee finds increasing support for the abolition of parole. Maine became the first state to implement a flat sentence system. ME. REV. STAT. ANN. tit. 17-A, §§ 1253-54 (1975). Similar proposals are being considered in several jurisdictions including Minnesota. California and Indiana have recently enacted such legislation to take effect July 1, 1977." American Bar Association, Standards Relating to the Legal Status of Prisoners § 9.1(a), comment (a) (Tent. Draft 1977) *in* 14 Am. Crim. L. Rev. 377, 592 (1977).

ary Committee criticized the uncontrolled exercise of discretion by parole decisionmakers. "The parole system has long been recognized as the single most unequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975). The recent American Bar Association inquiry cited as a major abuse the fact that a prisoner "is placed under the largely unreviewable discretion of a board who determines the length of his confinement on the basis of factors either unknown to him or unknown to it." American Bar Association, Standards Relating to the Legal Status of Prisoners § 9.1(a), comment (a) (Tent. Draft 1977) *in* 14 Am. Crim. L. Rev. 377, 591 (1977).

After a detailed review of California's parole release procedures, the Committee on Criminal Justice of the State Bar of California recommended that release review hearings be conducted in a manner affording the prisoner procedural due process. This recommendation was based on findings that, despite the importance of the release decision to the inmate,

> "[r]elease decisions made by the Adult Authority under the former procedure were arbitrary, capricious, subjective, ungoverned by rational standards, and grossly unfair in operation.
>
> * * * *
>
> "At the release hearings, individualized justice appears to be administered in a manner which is regularly . . . contrary to our democratic ideal that laws and not men control the substantial rights of people." State Bar of California Committee on Criminal Justice, *Report and Recommendations on Sentencing and Prison Reform* 4, 146 (1975).

A decision upholding the argument advanced by petitioners and the United States would seriously undermine this Court's trend of decisions requiring minimum procedural safeguards for "protection of the individual

against arbitrary action of government." *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 558 (citation omitted). The legitimate exercise of discretion by parole boards is not jeopardized by requiring a few procedures to assure fairness. See *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 483 ("A simple factual hearing will not interfere with the exercise of discretion.") What is jeopardized by a contrary decision, however, is our long-standing commitment to the proposition that purely "[a]rbitrary action is not due process." *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670, 678 (1967).

D. Nebraska State Law, Like Federal Law, Creates A Liberty Interest In Parole Release

Both petitioners and the United States discuss extensively whether Nebraska's parole law constitutes an entitlement vesting prisoners with a constitutionally protectable liberty interest. Brief for Petitioners at 17-20; Brief for United States at 20-21, 24-37. *Amici* believe that, as we have discussed in the preceding sections of this brief, the parole release decision, by its very nature, implicates constitutional "liberty" in the fundamental sense of "freedom from bodily restraint." *Meyer* v. *State of Nebraska*, 262 U.S. 390, 399 (1923). For that reason, the Court need not examine whether state law creates a "legitimate claim of entitlement" in this case. Compare *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (property), with *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 482 (1972) (liberty). If the Court looks to state law, however, it will find that the Nebraska parole statute, like federal law, also creates a "liberty interest" in parole. Cf. *Wolff* v. *McDonnell*, *supra*, at 577 (1974).

1. *The Nebraska Statute*

In its argument, Nebraska relies on the purportedly dispositive constitutional significance of the statutory phrase "shall order his release unless . . . ." NEB. REV.

STAT. § 83-1, 114(1) (1976). Nebraska contends that the legislature created no entitlement by the use of these words, which merely "constitute instructions to the Board of Parole as to the factors to be taken into account in reaching its decisions." Brief for Petitioners at 18.

This argument is untenable. First, Nebraska ignores the fact that similar language in its own good-time statute was held in *Wolff* to create a liberty interest protected by the Fourteenth Amendment. *See* 418 U.S. at 557.[18] Second, the plain language of the statute, as the Solicitor General recognizes, gives "every Nebraska prisoner a legitimate claim of entitlement to release on parole, subject to defeasance only if the parole authorities find one of a limited number of things." Brief for the United States at 35.[19] The experienced Nebraska federal judge who tried this case also found that the statutory scheme creates a "liberty" interest. Pet. App. 29-36. This determination was upheld by the Court of Appeals and is entitled to deference. *Bishop* v. *Wood*, 426 U.S. 341, 345-47 (1976).

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[18] Nebraska law limited the prison administrator's discretion in ordering forfeiture or withholding good time. "Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges." 418 U.S. at 545, n.5. Only in such "flagrant or serious cases" was the administrator permitted to forfeit or withhold a prisoner's good time.

[19] Nebraska's provision ("shall order his release unless") is even more forthright and explicit than the statutory "for cause" limitation on dismissals of federal government probationary employees held in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), to create a "property" interest in continued federal employment, and thus to implicate the Due Process Clause. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9-12 (1978); *Dixon* v. *Love*, 431 U.S. 105, 107-12 (1977).

According to the Solicitor General's analysis of *Arnett*, such a statutory requirement of a showing of "good cause" to justify departure from the norm, "[a]lthough this requirement of 'good cause' is surely vague, and calls for discretionary decisions," establishes "a property interest that could be terminated only in accord with procedures established by the Due Process Clause. See 416 U.S. at 165-166 (opinion of Powell, J.), 177-186 (opinion of White, J.), 207-211 (Marshall, J., dissenting)." Brief for the United States at 36.

The Solicitor General also disputes Nebraska's additional argument that no entitlement is created because the parole statute, unlike its law allowing forfeiture of good time credits for only serious misconduct, permits "a number of more diffuse and discretionary criteria [to] be invoked to deny early release on parole." Brief of the United States at 35. The Solicitor General reasons as follows:

> "But *Meachum* involved essentially unbridled discretion . . . . Here, however, *there is a statutory presumption in favor of parole; administrative discretion is not unbridled.* The Nebraska parole statute is quite similar to the federal statute involved in *Arnett* v. *Kennedy*, [416 U.S. 134 (1974)], and in *Arnett* six Justices concluded that the statute had created a property interest.
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> ". . . Here, as in *Wolff* and *Arnett*, a statute has created an expectation that the state may not disappoint without following procedures required by the Due Process Clause." *Id.* at 36 (footnote omitted; emphasis added).

2. *The Federal Parole Scheme Parallels Nebraska's System*

In 1976 Congress passed comprehensive parole reform legislation designed to curb abuses of the discretionary authority vested in federal parole officials by making the federal parole system fairer, more intelligible, and more predictable. In terms of the standards governing parole release, the pertinent language[20] provides that a federal "prisoner *shall be released*" if he has

> (a) "substantially observed the rules of the institution or institutions to which he has been confined"; and

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[20] Pertinent provisions of the Parole Commission and Reorganization Act, as well as the Parole Commission's regulations, are set forth in Appendix A of this Brief.

(b) "if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

"(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

"(2) that release would not jeopardize the public welfare." 18 U.S.C. § 4206(a) (emphasis added).[21]

The federal parole laws are a virtual carbon copy of Nebraska's parole legislation in three significant respects. First, Nebraska law requires that every prisoner shall have a release hearing "within sixty days before the expiration of his minimum term less any reductions." NEB. REV. STAT. § 83-1, 111(1) (1976). Likewise, federal law requires that the Parole Commission "shall conduct a parole determination proceeding . . . not later than thirty days before the date of . . . eligibility for parole." 18 U.S.C. § 4208(a).[22]

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[21] The federal parole statute further provides that the Parole Commission must make the release decision "pursuant to guidelines promulgated by the Commission . . . ." 18 U.S.C. § 4206(a). The Parole Commission may deviate from these guidelines only "if it determines there is *good cause* for so doing . . . [and] . . . the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon." 18 U.S.C. § 4206(c) (emphasis added). *See* note 19, *supra*.

[22] The quoted provision pertains to prisoners whose sentences, pursuant to 18 U.S.C. § 4205(a) and 18 U.S.C. § 4205(b)(1), prescribe that they shall be eligible for parole after serving one-third of their sentences or at some fixed point less than one-third of their sentences. Prisoners sentenced pursuant to 18 U.S.C. § 4205(b)(2) are eligible for parole whenever the Parole Commission may determine. Congress has required that their parole determination proceedings "shall be held not later than one hundred and twenty days following such prisoner's imprisonment . . . in a Federal institution . . . ." 18 U.S.C. § 4208(a).

A hearing is understandably not required if the Parole Commission "determines on the basis of the prisoner's record that the prisoner will be released on parole." 18 U.S.C. § 4208(a).

Second, Nebraska law specifies particular factors that must govern the release decision. In considering an eligible prisoner, the Nebraska Board of Parole "shall order his release unless it is of the opinion that his release should be deferred" because of one of four reasons. NEB. REV. STAT. § 83-1, 114(1) (1976). One such condition is that "[h]is release would depreciate the seriousness of his crime or promote disrespect for law." *Id.* § 83-1, 114(1)(b). Similarly, Congress has mandated specific criteria which the Parole Commission must follow in a parole determination proceeding. A "prisoner shall be released" if, among other things, his "release would not depreciate the seriousness of his offense or promote disrespect for the law . . . ." 18 U.S.C. § 4206(a)(1).[23] These provisions of the Nebraska and federal parole laws are derived from the same source—the Model Penal Code. *See* D. Stanley, *Prisoners Among Us: The Problem of Parole* 48 (1976).[24]

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[23] Nebraska law also permits denial of parole if "[t]here is a substantial risk that [the prisoner] will not conform to the conditions of parole . . . ." NEB. REV. STAT. § 83-1,114(1)(a). The corresponding federal standard permits withholding of parole if the prisoner's "release would . . . jeopardize the public welfare . . . ." 18 U.S.C. § 4206(a)(2). These provisions express the theory of sentencing commonly termed "incapacitation." *See* D. Stanley, *Prisoners Among Us: The Problem of Parole* 11-13, 48 (1976).

[24] The Model Penal Code provides:

"Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, *it shall* be the policy of the Board to *order his release, unless* the Board is of the opinion that his release should be deferred because:

"(a) there is a substantial risk that he will not conform to the conditions of parole;

"(b) his release at that time would depreciate the seriousness of his crime or promote disrespect for law;

"(c) his release would have a substantially adverse effect on institutional discipline; or

"(d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially

[Footnote continued on page 28]

Third, the plain language and operation of the Nebraska parole statutes demonstrate that the legislature opted for an administrative system incorporating a presumption in favor of release, but at the same time permitting the exercise of informed discretion to deny parole if the Parole Board determines that one of the statutorily-enumerated reasons for denial applies in a given case. By the same token, Congress has enacted an almost identical statutory scheme reflecting "a similar, more positive, policy." *Id.*

3. *The Argument of the United States Rests On Plainly Erroneous Assumptions*

Given these remarkably close parallels between the Nebraska and federal parole laws and the Solicitor General's unequivocal argument that a Nebraska-type parole statute creates an "expectation that the state may not disappoint without following procedures required by the Due Process Clause,"[25] the Solicitor General would be expected to take the same position with respect to the federal parole statutes. Remarkably, the United States, without critically examining, much less quoting, the federal parole laws, declares that the "United States and most of the states employ . . . a discretionary system . . . under which the parole decision is committed to *the unfettered discretion* of the parole authorities." Brief for the United States at 21 (emphasis added); *see also id.* at 4, 15, 21, 31, 32 n.7 (semble), 38 n.19. In terms of the parole laws of the United States and almost all states, the Solicitor General is sorely mistaken.

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[24] [Continued]
enhance his capacity to lead a law-abiding life when released at a later time." American Law Institute, Model Penal Code § 305.9(1) at 104-05 (P.O.D. 1962) (emphasis added).

[25] Brief for the United States at 36; *see also id.* at 4, 15, 19, 21.

a. *The "Unfettered Discretion" Assumption*

First, as we have shown, Congress has clearly created a parole system which does not allow the Parole Commission to deny parole "for whatever reason or for no reason at all." *Meachum* v. *Fano, supra*, 427 U.S. at 228. Pursuant to 18 U.S.C. § 4206(a), the Commission's exercise of discretion is governed by specific, legislatively-prescribed criteria.[26] Borrowing from the Solicitor General's own analysis, we can see that, because decisions to grant or deny parole in the federal system "turn on particular findings . . ." (such as potential jeopardy to the public welfare), a prisoner has a "legitimate claim of entitlement." Brief for the United States at 30.[27]

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[26] One misstatement in the Solicitor General's brief is characteristic of the seriously flawed premises underlying the position of the United States. The Solicitor General categorically states:

> "The United States does not have . . . a set of rules of general applicability establishing substantive release criteria binding on the decision maker." Brief for the United States at 38, n.19.

This assertion would undoubtedly come as a complete surprise to the members of Congress who mandated specific parole release criteria in 18 U.S.C. § 4206(a), and to the Parole Commission which has bound itself to follow a system of "guidelines for parole release consideration" in order "[t]o establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decisionmaking without removing individual case consideration . . . ." 28 C.F.R. § 2.20(a) (1977).

[27] The Brief for the United States takes inconsistent positions on the effect of discretion in a parole system in determining whether a prisoner has a government-created entitlement to release sufficient to be protected by the Due Process Clause. In one context, the Solicitor General argues that no entitlement can be found "[s]o long as the system of release is fundamentally *an exercise of informed discretion* . . . ." Brief for the United States at 32 (emphasis added). Yet the Solicitor General later argues that the Nebraska parole law creates a legitimate entitlement even though "a number of . . . diffuse and discretionary criteria may be invoked to deny early release on parole." *Id.* at 35. At another point, the Solicitor General argues that a constitutionally protected expectation is created by parole laws which provide criteria for decision-making so that "administrative discretion is not unbridled." *Id.* at

[Footnote continued on page 30]

Second, the Solicitor General's unsubstantiated generalization about the parole laws of "most of the states" is simply incorrect. For purposes of this case, *amici* have reviewed the parole statutes of the fifty states. The results of this study are set forth in Appendix B of this Brief.[28] From available information,[29] it can be seen that the legislatures of 47 states have prescribed standards, criteria, or factors to guide the paroling authority in making parole release determinations.[30] Many of these states have adopted standards identical or very similar to the release criteria in the Model Penal Code, after which the Nebraska and federal parole statutes are modeled. A common formulation provides that a prisoner may be released on parole "if (1) it appears . . . that there is reasonable probability that such inmate will live and remain at liberty without violating the law and (2) such release is not incompatible with the welfare of

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[27] [Continued]

36. *Amici* suggest that the Solicitor General's inconsistent arguments are the inevitable result of an *ad hoc* approach to this question.

[28] For the convenience of the Court, we have also included in Appendix C a table of official citations of the state parole laws.

[29] The sources of information for this review were the most recently available state statutes and an empirical study of state parole board laws and practices. *See* V. O'Leary & K. Hanrahan, *Parole Systems in the United States* (3d ed. 1976). *Amici* did not have access to most of the various regulations, policy statements and other interpretative materials which many state parole boards use to structure the exercise of their discretionary authority. *See, e.g.*, Kentucky Administrative Regulations, Kentucky Parole Board, ch. 1 (1977); New York State Compilation of Rules and Regulations, Division of Parole, tit. 9, § 8000 *et seq.* (1978).

[30] Only three state legislatures appear to have provided no explicit statutory guidance to their parole release decisionmakers. *See* ME. REV. STAT. tit. 34, § 1552 (1978); WASH. REV. CODE ANN. § 9.95.110 (1977); WYO. STAT. § 7-13-402 (1977). Each of these state parole laws, however, authorizes the parole board "to promulgate reasonable rules and regulations . . . *which shall establish the general conditions under which parole shall be granted and revoked.*" WYO. STAT. § 7-13-402(d) (1977).

society." CONN. GEN. STAT. Ann. § 54-125 (West Conn. Supp. 1978); *see also* MASS. GEN. LAW. Ann. ch. 127, § 130 (West 1972); TENN. CODE ANN. § 40-3614 (Cum. Supp. 1978); COLO. REV. STAT. § 17-1-201(3)(c) (Cum. Supp. 1976).

Constitutional adjudication affecting the lives of thousands of prisoners should not be grounded on speculation and conjecture or based upon the rhetorical flourishes of appellate counsel. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 420 (1974) (considerations urged by New Jersey's counsel in parole case proved irrelevant in practice to State parole board). Virtually all states have placed statutory restraints on paroling authorities to assure that "administrative discretion is not unbridled." Brief for the United States at 36. Again borrowing from the Solicitor General's own analysis:

> "[a] legitimate claim of entitlement exists . . . when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts or specific findings. . . . Where the state has bound itself to extend or confer a benefit, or withhold a sanction, on the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that those findings will be made fairly and accurately." Brief for the United States at 29-30.

b. *The "Presumption In Favor of Release" Fallacy*

The United States also argues that constitutionally-protected entitlement to release may be found if a state, like Nebraska, "sets up a presumption in favor of release" in its parole statute. Brief for the United States at 32; *see also id.* at 34, 36. The Solicitor General claims

that such a presumption is "missing from the federal parole statute and from most other state statutes . . . ." *Id.* at 35. This position is unsound for three reasons.

First, as we have shown, almost all state statutes conform to the controlled discretion model which the United States concedes confers a legitimate entitlement to release.

Second, as we have also shown, the federal and Nebraska parole statutes are virtually identical in all critical respects, including release criteria and the use of the phrase "shall release." The Solicitor General has conceded that a Nebraska-type statute creates a presumption in favor of release requiring due process protections.

Third, *Wolff* v. *McDonnell* dictates that, whatever the language of a state's parole statute, due process applies to the parole release determination. The Court's rationale in part for finding a protected liberty interest in *Wolff* was the existence of a *state-created right to a means of reducing the length of confinement* through the earning of good time credits under stipulated criteria.

> "Nebraska may have the authority to create, or not, *a right to a shortened prison sentence* through the accumulation of credits for good behavior . . . . But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." 418 U.S. at 557 (emphasis added).

Good time laws and parole are constitutionally indistinguishable. Good time credits lower the period for mandatory release, while the grant of parole effectively suspends the remainder of the originally prescribed period

of incarceration. In the case of good time credits and parole, the practical effect is the same: shortening the amount of time spent in prison.[31] *Wolff* therefore requires that the prisoner's interest in reducing his prison time—whether by means of parole or good time credits—be constitutionally protected.

The arguments of the United States confirm the danger of predicating entitlement to precious constitutional rights on elusive semantical nuances. The degree of due process protection afforded prisoners should not turn on the rules of grammar and syntax. All states and the federal government have established a system for releasing prisoners on parole. The government-created right is to be paroled some time either "if" certain qualifying conditions are satisfied or "unless" certain disqualifying circumstances exist. It is the practice of granting parole to seven out of every ten prisoners, and not the precise words of any statute, which creates an entitlement worthy of constitutional protection. As Justice Frankfurter, speaking for the Court, observed:

> "Settled state practice . . . can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text." *Nashville C. & St.L.Railway* v. *Browning*, 310 U.S. 362, 369 (1940). *Cf. Monell* v. *New York City Dept. of Soc. Serv.*, —— U.S. —— & n.56 (June 6, 1978); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970) ("custom or usage" as constituting state law under 42 U.S.C. § 1983).

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[31] In practice, parole has a more substantial effect in reducing the term of a prisoner's incarceration. For example, under federal law, an inmate's length of confinement can be reduced by as much as one-third by earning good time credits. On the other hand, parole operates to reduce the average term of imprisonment by as much as one-half. P. O'Donnell, M. Churgin and D. Curtis, *Toward A Just and Effective Sentencing System: Agenda for Legislative Reform* 70 (1977).

"In our view, . . . it would exalt form over substance if this distinction [based on the precise words chosen by a legislature] were found to justify a result different from that in [*Wolff*]." *Wolman* v. *Walter*, 433 U.S. 229, 250 (1977).

II.

THE INTERESTS AT STAKE REQUIRE AT LEAST FOUR PROCEDURAL PROTECTIONS BEFORE PAROLE MAY BE DENIED

Once it is concluded that the Due Process Clause applies to parole release decisions, the question of "what process is due" arises. *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 481. As a constitutional minimum, sufficient process must be accorded so that a prospective parolee has an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). *Amici* believe that at least four general procedural rights are constitutionally required to promote fair parole release decisionmaking: an effective hearing; a decision based on accurate information; a statement of reasons for parole denial; and an adequate record of the proceeding.

A. The Interests At Stake

What procedures are required vary with the nature of the private interest affected by the official act, the public interest in the process, the risk of error in decisions based upon minimal procedures, and the value and costs of additional safeguards. *Dixon* v. *Love*, *supra*, 431 U.S. at 112-13; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 334-35. For the prisoner being considered for parole, the private interest at stake is freedom itself—a fundamental human right protected by the Constitution. In a society which provides procedural protection to the right to freedom from a violation of physical integrity (*Ingraham* v. *Wright*, 430 U.S. 651, 673-74 (1977)), and the right to continued utility service (*Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978)), surely freedom is to be accorded substantial protection.

The state has a parallel interest in the efficient administration of the parole system, and in preserving the integrity and appearance of integrity of the parole process. This interest is dictated by the unique and well-established role of parole release in the criminal justice system and rehabilitative process. Because an inappropriate grant *or* denial of parole may undercut the retributive, deterrent and incapacitative functions of sentencing, parole release decisions must not be arbitrary and must be based on all available accurate data. *See, e.g., United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, *supra*, 500 F.2d at 932-33.

The American Bar Association has recognized the mutual interests of the state and the prisoner in fair procedures. The Joint Committee on the Legal Status of Prisoners recommended that

> "release decisions be arrived at through fair procedures that insure substantial participation by the prisoner. Although the development of guidelines and the use of goals other than rehabilitation may minimize the potential for factual disputes in the decision-making process, the power of the releasing authority to formulate decisions outside the guidelines and the nature of the guidelines themselves dictate that procedures be fair and open. As in other circumstances where the Committee has recommended procedural regularity, it believes not only that the apperance of justice will be improved but that the factual basis for decisions will be enhanced." American Bar Association, Standards Relating to the Legal Status of Prisoners (Tent. Draft 1977), *in* 14 Amer. Crim. L. Rev. 377, 598 (1977).

This concern with fairness and accuracy is shared by society in general since it, too, has a substantial interest in the integrity and success of the rehabilitative process. To fulfill its promise to society, parole must not frustrate or embitter prisoners by subjecting them to what are, or appear to be, arbitrary or irrational decisions based on caprice or inaccurate information.[32] The importance of parole's impact on the rehabilitative process, recognized by this Court in the revocation context in *Morrissey*,[33] is heightened in the parole release decision setting. The greater number and greater public awareness of parole release decisions, as compared with revocations, make their fairness all the more crucial. Additionally, premature release of a prisoner may impose additional costs on society in the form of additional crime, while an erroneous denial results in the high cost of continuing imprisonment and prevents the prisoner from becoming a productive citizen.

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[32] The Attica Commission found that "[f]ar from instilling confidence in the Parole Board's sense of justice, the existing procedure merely confirms to inmates, including those receiving favorable decisions, that the system is indeed capricious and demeaning." *Official Report of The New York State Special Commission on Attica* 98 (Bantam Books ed. 1972); *see also id.* at 97. Two of the "Fifteen Practical Proposals" put forward by the Attica inmates related directly to parole. *See* T. Wicker, *A Time To Die* 317 (1975).

[33] "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See *People ex rel. Menechino* v. *Warden*, 27 N.Y.2d 376, 379, and n.2, 267 N.E.2d 238, 239, and n.2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S. at 484.

These considerations flowing from the state's and society's interests in ensuring the integrity of the parole process are consistent with the prisoner's interest in "liberty" through conditional freedom from incarceration. He, too, has an interest in the release decision being made on the basis of accurate data. He, too, has an interest in having all such available data before the decisionmaker. And, perhaps most importantly, he, too, has an interest in being free from arbitrary decisions or decisions cloaked in secrecy and influenced by irrational, inconsistent or impermissible criteria. *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d at 929. In the absence of any indication of how decisions are made or on what factors they are based, prisoners are left to counterproductive speculation and are deprived of an important incentive and guide to future conduct. *See Morrissey* v. *Brewer, supra*, 408 U.S. at 484; *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d at 932-33. "'One can imagine nothing more cruel, inhuman and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for release.'" K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* 132 (1969), *quoting* Porter, *Criteria for Parole Selection, in* Proceedings of American Correctional Association at 227 (1958).

In addition to these interests, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" must be considered. *Mathews, supra*, 424 U.S. at 335. The costs of any such additional procedures must also be examined. *Ingraham, supra*, 430 U.S. at 680-81; *Mathews, supra*, 424 U.S. at 348.

Secondary sources and the experience of *amici* suggest that serious factual error is not uncommon in the files relied upon by parole authorities. *See, e.g.*, Project, *supra*,

84 Yale L.J. at 833-35.[34] Parole decisions are not made "in response to conduct directly observed" by the decision-makers. Prisons are closed, not open institutions. *See Ingraham, supra,* 430 U.S. at 677-78. Decisions are not "largely automatic." *Compare Dixon* v. *Love,* 431 U.S. 105, 113 (1977). And parole board members, unlike the teachers in *Ingraham,* are generally immune from personal court action based on their official conduct. *Cruz* v. *Skelton,* 502 F.2d 1101 (5th Cir. 1974); *United States ex rel. Harrison* v. *Pace,* 380 F.Supp. 107, 111 n.4 (E.D.

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[34] As researchers for the United States Board of Parole have complained:

> "Unfortunately, the files are not uniformly complete and frequently include obviously conflicting information [such as vocational or educational programming and drug use].
>
> "In one file, an inmate was listed as an illiterate who spoke only Spanish at admission. A later report listed the inmate as having completed 40 hours of college credit . . . .
>
> "Instances of misfiling are frequent. Often a report will indicate that the same subject is a white male, while the picture in that same file shows what appears clearly to be a black (or vice versa). Presentence reports are often found inaccurately filed . . . .
>
> "Numerous examples of discrepancies in the files could be cited [such as birth dates and date of first arrest] . . . .
>
> "The inmate's arrest record is an important source [of information]. In many cases no specific information is given about the number of prior arrests, convictions, dates, fines, or time actually served. The Federal Bureau of Investigation arrest records which appear in many of the files are very difficult to use, since the same arrest and conviction may be entered six or seven times at each stage of arrest, transfer, conviction, and incarceration; and dispositions often are not shown.
>
> ". . . [This] lack of uniformity, clarity, and concern for the accuracy of information [in prison files] sets obvious limits upon the quality of information which may be reliably extracted from the files . . . ." S. Singer & D. Gottfredson, *Development of a Data Base for Parole Decision-Making* 2-5 (NCCD Research Center, Supp. Report No. 1, 1973).

Pa. 1974). All of these factors suggest a level of risk of error indicating the necessity for procedural safeguards.[35]

B. Current Practices In The State And Federal Systems

In making the actual determination of which procedural protections are constitutionally required under the circumstances, this Court has mandated scrutiny of current practices and consideration of the utility and value of additional safeguards. This scrutiny allows the Court to perform the balance contemplated by *Mathews.* 424 U.S. at 335.

Such a review of the current practices under state and federal parole laws reveals that most jurisdictions provide more procedural protections than those found inadequate in Nebraska. The Survey of Federal and State Parole Laws, prepared by *amici* and reproduced in Appendix B, reveals that almost all states currently provide, by statute or judicial decision, a spectrum of procedural protections designed to preserve the rights of prisoners seeking parole. These systems function effectively under these procedures despite dire forecasts of crippling administrative burdens.[36]

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[35] As the Solicitor General points out, this Court has ruled that: "[P]rocedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases . . ." *Mathews* v. *Eldridge, supra,* 424 U.S. at 344, *quoted in* Brief for the United States at 44.

[36] The United States suggests that the incorporation of minimal procedural protections into parole proceedings could inhibit "future experimentation and alteration of the parole release process . . . ." Brief for the United States at 5.

In terms of the federal parole system, this argument is contrary to the express judgment of Congress in passing the Parole Commission and Reorganization Act. As we have demonstrated, both committees in the House and Senate were well aware that the discretion of the Parole Commission was being circumscribed to a certain extent and that the legislation provided for "an infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th

[Footnote continued on page 40]

That current state practice and policy increasingly recognizes procedural safeguards was applauded by the American Bar Association:

> "Procedural safeguards have been imposed on parole release decisions through legislation. In some states, parole boards are required by statute to hold hearings on parole release. And some recent cases on the federal level have indicated that the Administrative Procedure Act is applicable to the United States Board of Parole . . . . *King* v. *United States*, 492 F.2d 1337 (7th Cir. 1974); *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).
>
> "The American Law Institute Model Penal Code recommended that prisoners be given an informal hearing on the issue of parole release and that in preparation for parole the prisoner be able to advise with persons of his own choosing including his own legal counsel. § 305.7. The National Advisory Commission went further recommending disclosure of information, reasons for decision, and representation by counsel if required. NAC, § 12.3 (1973). See also, Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CALIF. L. REV. 1519 (1972); Comment,

[36] [Continued]
Cong., 1st Sess. 2 (1975); *see also* S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975). If Congress was not troubled that these parole reforms would retard the further development of a fair and effective parole process, we submit that the Court should likewise not be concerned.

Moreover, imposing a requirement that a process be fair is a far cry from a judicial takeover of the parole process. Parole boards will remain free to exercise their traditionally broad discretion, to devise standards and criteria for release best suited to the needs of their respective states, and to experiment with new procedures to enhance the reliability and integrity of their decisions. "The few basic requirements set out above . . . should not impose a great burden on any State's parole system." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 490.

> *Procedural Protections at Parole Release Hearings: The Need for Reform*, 1974 Duke L.J. 1119.
>
> ". . . The Committee recommends a hearing with the prisoner present in all parole release decisions." American Bar Association, Standards Relating to the Legal Status of Prisoners (Tent. Draft 1977), *in* 14 AMER. CRIM. L. REV. 377, 598 (1977).

C. The Need For Safeguards

Current practice in Nebraska mandates the consideration of a number of factors in the parole release decision. The Parole Board must consider the inmate's background, personal history, family and social connections, employment history, criminal behavior, adjustment in prison, and current status and behavior. *See* NEB. REV. STAT. § 83-1, 114(2)(a)-(n) (1976). To make its decision in accordance with statutorily-mandated criteria, the Board thus requires a substantial factual record. To be meaningful, this record must be both accurate and current. As a result, to ensure fairness and to prevent arbitrary, capricious, or simply misinformed judgments, effective procedural safeguards must be afforded.[37]

Amici respectfully submit that the requisite minimum due process procedures for parole decisionmaking are:

1. The right to an effective hearing, including the right to advance notice of time and criteria, the right to a personal appearance, and the right to be accompanied by a representative;

[37] Nebraska's procedures at the initial and critical parole review are deficient in several respects. First, neither advance notice of the time of the hearing nor of the criteria to be applied is provided to the prisoner. Second, prisoners are not given access to the information used by the Board in reaching its decision; nor are they given the right to reply to the information presented in all cases. Third, prisoners are not advised of the reasons for which parole was denied. Finally, prisoners are not given a record of the proceedings, or even summaries of the evidence relied on by the Board.

2. The right to have the decision based on accurate information, including prior access to files and the right of reply;

3. The right to a written statement of the reasons on which the decision was based; and

4. The right to a record of the proceedings, capable of being reduced to a transcript.[38]

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[38] The American Bar Association's study group has recommended similar release procedures.

"9.2 Procedures for Determining the Length of a Sentence to Imprisonment

(a) Prisoners should have a hearing within 90 days of their confinement for the purpose of establishing the date of their release.

(b) At least 15 days prior to the hearing, the prisoner should be notified of:

(i) The time and place of the hearing and his rights and the procedures applicable thereto;

(ii) The names of persons known to the releasing authority who will present testimony at his hearing and the likely nature of their testimony;

(iii) The time and method by which the prisoner or his advisor may obtain access to the prisoner's file and other information to be utilized at his hearing.

(c) Prior to the hearing, the prisoner and his advisor should be permitted to read the contents of the prisoner's file and all other written information to be utilized by the authority in reaching its decision.

(d) The hearings should be informal in nature. The prisoner should be entitled to be represented by an advisor of his choice, including legal counsel and he or his advisor should be entitled to comment on information available to the releasing authority, to present additional information either orally or in writing, and to question or cross-examine witnesses giving oral testimony. Upon a showing that a third person's oral testimony would be subject to disclosure if in written form, and is (1) relevant to the decision or to a contested issue of fact, and (2) (a) could not effectively be presented in written form, or (b) should be subjected to cross examination, the authority

[Footnote continued on page 43]

As the discussion below demonstrates, all these rights are already required in the federal system. *See* 18 U.S.C. §§ 4201-4218; 28 C.F.R. § 2.01 *et seq.* In the past, the Court has scrutinized federal practice to provide guidance on questions of minimum standards for fair, effective, and manageable decisionmaking in the correctional process. *See Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 786-89; *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 488-89; *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 567-68. The experience of *amici* reflects that the federal model reasonably accommodates the interests of prisoners in fair and accurate

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[38] [Continued]

should secure such testimony by subpoena or otherwise at public expense.

(e) When the prisoner has had an opportunity at a sentencing hearing to contest facts relevant to determining the length of sentence, the release authority may accept the facts as determined at that hearing without considering additional testimony or evidence.

9.3 Setting the Date of Release

(a) Within 15 days of the hearing, the releasing authority should set the prisoner's release date. The release date should be that established by the guidelines unless:

(i) the case presents a factor relevant to a principle of sentencing which is not taken into account in the guidelines;

(ii) application of the guidelines would result in substantial injustice to the person or the public;

(iii) application of the guidelines would be inconsistent with the sentence imposed by the court.

(b) Unless the release date is that established by the guidelines the authority should write and deliver to the prisoner a fully reasoned opinion explaining in specific detail why the guidelines were not followed in his case. With the name and other personally identifiable parts deleted, these opinions should be distributed to prisoners generally and open to public inspection. The opinions should serve as precedents for future decisions and as material for periodic review and revision of the guidelines."

American Bar Association, Standards Relating to the Legal Status of Prisoners §§ 9.2, 9.3 (Tent. Draft 1977) *in* 14 Am. Crim. L. Rev. 377, 597-98, 601 (1977).

parole decisions and the administrative needs of paroling authorities for efficient and expeditious procedures for large-scale decisionmaking. Project, *supra*, 84 Yale L.J. at 861-66.

1. *The Right to an Effective Hearing*

a. *Advance Notice of the Time of the Hearing and the Criteria To Be Applied*

This Court has recognized that advance written notice of potentially adverse government action occupies a cardinal position in fair process.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Memphis Light, Gas & Water Div.* v. *Craft*, *supra*, 436 U.S. at 13, *quoting Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted).

Parole release decisions should be based on criteria which are announced in advance, and which relate to the various purposes which parole serves within the state's sentencing and correctional process. Nothing could be more characteristic of the arbitrariness forbidden by the Due Process Clause than the failure of an official decision to relate to legitimate public purposes. Since a parole authority is expected to perform several potentially conflicting functions, it has a responsibility to articulate how it has reconciled them in a given case. When criteria are clear, the prisoner and his representative are able to make a more effective and useful presentation. The decisions become fairer, because they are more rational, more consistent and more intelligent.

The federal parole statute responds to this requirement by providing for notification of the time and place

of the hearing at least 30 days in advance, 18 U.S.C. § 4208(b), and a description of the standards to be considered, 18 U.S.C. § 4206(a); 28 C.F.R. § 2.20. Only by giving prisoners sufficient time to gather the necessary information and to demonstrate that they can satisfy the established criteria can the board perform effectively. The right to an in-person hearing becomes a hollow ritual if the prisoner does not have sufficient opportunity to prepare. Contacting individuals in advance of the determination, and either obtaining supporting letters from them or arranging for their appearance at a parole board hearing requires substantial thought, time, and effort. Where, as in Nebraska, the Board of Parole is required to consider this information, it must provide reasonable opportunity for the inmate to generate these data. Adequate advance written notice of the date, time, and place of a parole board hearing is thus an integral component of fair and rational consideration.[39]

Similarly, notice of the criteria applied by paroling authorities is essential to enable the inmate both to understand the process and to prepare for the parole hearing. Under Nebraska law, much of an inmate's life comes under scrutiny when the Parole Board considers release.

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[39] In this case, the Eighth Circuit concluded that

> "[u]nder normal circumstances we believe that a minimum advance notice of 72 hours . . . allows the prisoner a fair opportunity to prepare for his appearance before the Board." *Greenholtz*, 576 F.2d at 1283.

We respectfully disagree. As described above, the information which the Nebraska Board must review involves facets of prisoners' past records, current behavior in prison, and future prospects. Prisoners must be given notice sufficiently in advance of the actual hearing to contact family, prospective employers, former attorneys—all outside the prison. Seventy-two hours advance notice simply does not provide the opportunity for adequate preparation of the needed data and is thus constitutionally inadequate. *See Memphis Light, Gas & Water Div.* v. *Craft*, *supra*, 436 U.S. at 14; *Mullane* v. *Central Hanover Bank and Trust Co.*, *supra*, 339 U.S. at 314.

See NEB. REV. STAT. § 83-1, 114(2)(a)-(n) (1976). For the Board to reach a decision premised upon accurate information, the inmate must be given the opportunity to submit information in support of the parole application and to prepare rebuttal to damaging or incorrect material in the file. Only if an inmate knows, in advance, of the criteria to be considered can his presentation to the Board be relevant to the parole granting decision.

Advance notice of criteria also increases efficiency by allowing inmates to make a presentation focusing on pertinent issues. The parole board can proceed to do its work effectively and efficiently. Demystifying the parole process better enables the prisoner to provide useful material in an orderly manner.[40]

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, supra,* 436 U.S. at 14, *citing Wolff* v. *McDonnell, supra,* 418 U.S. at 564; *Morrissey* v. *Brewer, supra; In re Gault,* 387 U.S. 1 (1967); *Joint Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123 (1951). Just as the notice in *Memphis Light,* which did not advise customers of the availability of procedures for protesting termination of services, was found to be constitutionally infirm, so notice of parole hearings, which do not inform inmates of the issues to be considered, does not pass constitutional muster. Inmates in Nebraska have been "deprived of the notice which [is] their due." *Memphis Light, supra,* 436

[40] It is particularly ironic that Nebraska's Board does not give notice of its criteria because the Nebraska Legislature has substantially organized the parole decision process and has directed its Board to consider several specific factors about inmates. The Board is required to base its decisions on the fourteen statutory criteria. NEB. REV. STAT. § 83-1, 114(2)(a)-(n) (1976). There is simply no reason why inmates should not be informed of these factors in advance of the hearing.

U.S. at 15 (footnote omitted). The federal provisions, however, comport with due process in this regard.

b. *Personal Appearance at the Hearing*

While "the ordinary principle, established by [this Court's] decisions, [is] that something less than an evidentiary hearing is sufficient," *Dixon* v. *Love, supra,* 431 U.S. at 113, *quoting Mathews, supra,* 424 U.S. at 343, an opportunity to appear in person, even without witnesses, is critical in the parole process. Evaluation of the prospective parolee's attitude and demeanor can be crucial, and simple reliance on prison reports would leave too great a part of the decision in hands other than the parole board's. Experience teaches that the fairest decisions are reached in a setting where the prisoner can respond to the examiner's concerns and can show his readiness for release.

The federal system protects this interest by allowing the prisoner to appear and testify in his own behalf. *See* 18 U.S.C. § 4208(a); 28 C.F.R. § 2.12. Where, as in Nebraska and most other states, the board must consider factors relating to the prisoner's personality and attitude, such an in-person hearing is essential to due process.

The board cannot know a prisoner's "personality" by reading a file. The board cannot assess a parole plan and determine the propriety of a prisoner's chosen residence or employment without talking with the inmate, learning of the reasons for the choice, and finding answers to its questions. The board cannot assess the reasonableness of an inmate's participation in, or lack of involvement with, prison programs without asking him. Obtaining accurate and complete answers to all of these and other questions is essential for the board to obey its statutory mandate. However, the board cannot effectively check the accuracy of material in its files without verification by the inmate.

Accurate data is thus essential to a fair—and a constitutionally sufficient—appraisal.

The principle that an in-person hearing is needed for fair adjudication is deeply rooted in the American judicial process. "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908), quoted with approval in *Memphis Light*, 436 U.S. at 16, n.17. This Court has repeatedly held that an in-person hearing is constitutionally required. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted with approval in *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976).[41]

[41] Nebraska statutes provide for two types of hearings. The first are "parole review" hearings in which the board, after a review of the file, meets with each inmate for a few minutes. At these "parole review" hearings, inmates are not allowed to present evidence or call witnesses on their behalf. NEB. REV. STAT. § 83-192(9); *Greenholtz, supra*, at 1277. Review hearings are required yearly, whether or not the inmate is to be fully considered for parole. *Greenholtz, supra*, at 1277. The other type of hearing in Nebraska is the "formal" hearing, in which the inmate may appear, may offer evidence in support of parole, and may be represented by retained counsel.

The Eighth Circuit ruled that these formal hearings were constitutionally required when the inmate is first considered for parole. *Greenholtz, supra*, at 1283. This rule is necessary to comply with minimal standards of due process, for whenever an inmate is considered for parole release, factual questions must be resolved. Where facts may be in dispute, inadequate, or inaccurate, record review has been found insufficient to determine the outcome. *Wolff* v. *McDonnell, supra* (prison discipline); *Morrissey* v. *Brewer, supra* (parole revocation); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (prior hearing required when social insurance payments in issue). *Compare Dixon* v. *Love, supra*, 431 U.S. at 114 (1977) (factual basis

[Footnote continued on page 49]

c. *The Assistance of a Representative*

This Court has recognized that prisoners, as a group, have a greater difficulty in communicating effectively than many others in society. *Wolff* v. *McDonnell, supra*, 418 U.S. at 570; *Johnson* v. *Avery*, 393 U.S. 483, 487 (1969). For this reason, and because the time available to make an informed parole decision is so short, an inmate's chosen representative can be an effective aid to all concerned. *See Project, supra*, 84 Yale L.J. at 832 n.103, 839-41, 862-63 (average time devoted to federal parole decision is less than one-half hour). Moreover, representatives experienced in the parole process and familiar with the statutory criteria for release can prepare inmates to bring the needed information to the attention of the board and to limit excursions into irrelevancies. Furthermore, they can make a more cogent and coherent presentation than an apprehensive inmate.

The federal parole system again provides a model. An inmate may be assisted by a representative, who may be a relative, friend, prison staff member, lawyer or law student, prior to and during the hearing. Although the role of the representative is to some degree limited, representation is nevertheless available. 18 U.S.C. § 4208(d); 28 C.F.R. §2.12(b).

This Court has previously recognized the crucial role representation plays in fair process. In *Gagnon* v.

[41] [Continued]

in driver suspension determination undisputed; in-person hearing not required since the only question at such a proceeding would be whether an administrator would "show leniency and depart from his own regulations").

The administrative burden imposed by rules requiring parole hearings for all eligible inmates in Nebraska is minimal. The Board already holds "review" hearings in all cases and "formal" hearings in many cases. From July 1, 1975 until June 30, 1976, a total of 1,972 hearings were held, the majority of which were "review" hearings. *Greenholtz, supra*, at 1277. In-person considerations would require only the opportunity for a meaningful face-to-face meeting with the board at a time at which an inmate can present fully the issues for the decisionmakers.

Scarpelli, 411 U.S. 778, 783-91 (1973), the Court held that counsel would have to be provided by the state in probation revocation proceedings where there is a factual dispute as to whether the alleged violation was committed, or where there are complex justifying or mitigating reasons. Furthermore, the decision of whether counsel is required must be made in relation to whether the probationer "appears to be capable of speaking effectively for himself." *Id.* at 791; *see also Wolff* v. *McDonnell*, *supra*, 418 U.S. at 570.

Although the Solicitor General has suggested that special administrative problems would be caused by permitting representation and personal appearance by the inmate at a parole hearing, no known data support this assertion.[42] To the contrary, experience shows that permitting representation at hearings conducted within prisons does not pose any difficulties. The federal system permits representatives to attend the 10,000 parole hearings it conducts annually. When revocation hearings are held in federal institutions, counsel is permitted. *See* 28 C.F.R. § 2.50. In addition, the United States Bureau of Prisons has for years required federal institutions to permit representatives to assist inmates at prison disciplinary proceedings. *See* 28 C.F.R. § 541.15(b).

Where a parole system is complex, as is in Nebraska, and the outcome is either freedom or continued incarceration, there must be a strong showing of administrative inconvenience to overcome the inmate's need for representation. No such showing has been made in the record before this Court.

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[42] Nebraska reports no such incidents of violence or disruption, despite the fact that the inmate is allowed to appear before the board with counsel when formal hearings are granted. *See, e.g.*, Annual Report of the Nebraska Board of Parole, Seventh Annual Statistical Report, July 1, 1975 to June 30, 1976.

2. *The Right to a Decision Based on Accurate Information*

The parole board, if it is to make reasoned decisions, must be sure that those decisions are based on accurate and complete information. This Court has recognized that prior access to information relied on by decisionmakers is an important protection against this error. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 345-46; *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 484.

To ensure that decisions are fair and based on accurate and complete records, the federal parole system allows the prisoner prior access to almost all of the documents on which the Parole Commission will rely. 18 U.S.C. § 4208(b); 28 C.F.R. § 2.55. The exceptions to disclosure track Rule 32(c) of the Federal Rules of Criminal Procedure concerning release of information to a defendant in a presentence investigation report. The Parole Commission withholds information where there is a potential of harm to the inmate or to others, or a need for confidentiality. A summary of the information in these documents must, however, be made available to the inmate. 18 U.S.C. § 4208(c).

Having reviewed these documents, the inmates are permitted to reply to them and to provide corrective or expanded information. Inmates may thus appear and testify on their own behalf. 18 U.S.C. § 4208(e); 28 C.F.R. § 2.13(a). Inmates may also submit letters, documents and other evidence for the record.

Parole hearings cannot be even minimally adequate unless inmates are allowed to present testimony relevant to the board's decision about parole.[43] Inmates must be

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[43] Apparently, Nebraska's statutes recognize, in part, that need and do permit inmates at the "formal" parole hearings to call witnesses. NEB. REV. STAT. § 83-195; *see also Greenholtz*, *supra*. Such routine practice demonstrates that calling witnesses is feasible and neither disrupts prison routine nor threatens institutional security.

allowed to present evidence "from a prospective employer about the type of work available, from a spouse about the home environment the prisoner can expect, and in the case of young offenders, parents' testimony about the guidance they can offer." *Franklin* v. *Shields*, *supra*, 569 F.2d at 796. Allowing the prisoner to participate fully in the hearing maximizes the quantity and the quality of the information considered by the board, increases the reliability of the decisionmaking process, and makes the process fairer in appearance as well as in fact.

We believe that the Court below erred by not requiring, absent exceptional circumstances, that inmates be permitted in formal hearings to call witnesses in their own behalf. In some situations, a meaningful presentation on a prisoner's behalf can be made only by a witness available for questioning by the parole board. Both factual and subjective judgments must be made by the parole authorities. Society must fashion its procedures to convey the necessary information to these decisionmakers.

A frequent response is that documents are an adequate substitute for live testimony. However, the Fourth Circuit recognized the unfairness of this approach last year when mandating that the Virginia Parole Board receive testimonial evidence because "some witnesses express themselves most effectively verbally." *Franklin* v. *Shields*, *supra*, 569 F.2d at 796. Given this fact, it is difficult to justify excluding oral testimony in light of society's critical need to be fully informed about the prospects for an applicant's rehabilitation if parole is granted. *Shields*, *supra*, at 796.

This Court's decision in *Wolff*, granting the right to call witnesses in prison disciplinary proceedings absent findings of institutional harm, compels the conclusion that prisoners should also be allowed to call witnesses in parole hearings absent express findings that permitting them to do so will be unduly hazardous to institutional safety.

Witnesses are even more important in parole hearings than in disciplinary proceedings. The interests of the prospective parolees are greater, as their liberty depends on the information furnished to the parole board. The interest of the state is similarly more important, as parole release affects all members of the community and must be based on thorough and accurate information. Moreover, in parole hearings, the testimony of witnesses will generally be less likely to cause institutional difficulties than in disciplinary proceedings. In most instances, witnesses in parole hearings will not be other inmates, and they will not testify about conditions or events within the institution. There is therefore much less probability of witnesses' creating risk of reprisal or undermining authority. *Cf. Wolff*, *supra*, 418 U.S. at 566. The justifications for providing witnesses are great, the corresponding burdens imposed minimal.[44]

3. *The Right to a Statement of Reasons For the Denial of Parole*

A statement of reasons serves many functions: to determine whether the decisions are based on appropriate criteria; to protect against arbitrary decisions; to promote care and thoughtfulness by decisionmakers; to foster rehabilitation by affording guidance for future conduct; to encourage development of a body of administrative precedent; and to educate sentencing judges about the

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[44] Since February of 1978, the United States Parole Commission has been required to provide most of the rights accorded under *Morrissey* to inmates subjected to parole rescission. *See Drayton* v. *McCall*, No. 78-2030 at 4905. (2d Cir. Oct. 2, 1978). Pursuant to that injunction, numerous rescission hearings have been held at which inmates are represented by counsel, present evidence on their own behalf and offer the testimony of witnesses. Insofar as attorneys for the *amici* are aware, not one report of institutional disruption or of threats to security has resulted. Instead, procedural fairness in the rescission decision has been assured without harm to other social values.

impact of parole decisions on their own judgments. *See United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra,* 500 F.2d at 929-34. Those Courts of Appeals reaching this issue have uniformly agreed that the provision of reasons for an adverse decision is the most important due process protection. *See Franklin* v. *Shields, supra.*

In the federal system, both a personal conference to explain the reasons for denial and a written statement of reasons are required. 18 U.S.C. §§ 4208(g), 4206(b), (c); 28 C.F.R. § 2.13. The administrative burden imposed by this requirement is minimal. Many states, as well as the federal government, have given such statements for years in parole revocation and discipline cases. *See, e.g., Morrissey* v. *Brewer, supra; Wolff* v. *McDonnell, supra; United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra.* The survey of federal and state parole laws conducted by *amici* indicates that at least 45 states furnish an inmate some form of a written statement explaining the reasons for denial of parole. *See* Appendix B. And as Justice Marshall has stated:

> "it is not burdensome to give reasons when reasons exist. Whenever an application . . . is denied . . . there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action. . . ." *Board of Regents* v. *Roth, supra,* 408 U.S. at 591 (1971) (dissenting); *see also Mathews* v. *Eldridge, supra,* 424 U.S. at 345-56; *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943); *Mower* v. *Britton,* 504 F.2d 396 (10th Cir. 1974).

Furthermore, every court which has held that the Due Process Clause protects parole or similar decisionmaking has mandated that, when parole is denied, the decisionmaker must state the reasons for the denial as well as

the essential facts or evidence relied upon. *See, e.g., Franklin* v. *Shields, supra; United States ex rel. Richerson* v. *Wolff,* 525 F.2d 797 (7th Cir. 1975); *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra; Coralluzzo* v. *New York State Parole Board,* 566 F.2d 375 (2d Cir. 1977), *cert. dismissed as improvidently granted,* 435 U.S. 912 (1978); *Childs* v. *United States Board of Parole, supra; see also Zurak* v. *Regan,* 550 F.2d 86 (2d Cir. 1977); *Haymes* v. *Regan, supra;* and *Drayton* v. *McCall, supra.*

The attempt of the United States to equate the sentencing process with the parole process does not advance the analysis in this case. First, the fact that judges are not required to provide reasons when sentencing, see *Dorszynski* v. *United States,* 418 U.S. 424 (1974), has no bearing here. As the District of Columbia Circuit described:

> "[w]e think the part the judge has been accorded in sentencing is so different from the status of the Parole Board in the penological system as to call for a different approach to the due process issue, and that the ruling in *Dorszynski* is not to be taken as a constitutional precedent for rejecting the need, under the Due Process Clause, of a written statement of reasons for Board denial of parole. . . . For the Board to exercise its discretion fairly and knowledgeably within the purposes of the system, rational means—rational considerations—must attend its functioning." *Childs* v. *United States Board of Parole, supra,* 511 F.2d at 1283-84.

Second, the sentencing decision is not as informal as the United States suggests. *See* Brief for the United States at 40. The Federal Rules of Criminal Procedure mandate procedures to ensure a sentencing decision predicated upon accurate information. For example, the defendant has ample advance notice of the time of sentenc-

ing, access to the presentence report relied upon by the judge, the opportunity to correct mistakes in that report, a right to an in-person hearing at which he may speak and a right to an attorney to help prepare for the sentencing hearing and to speak on behalf of the defendant at the time of sentencing. In sum, the accused has the right to participate fully in the sentencing proceeding. *See* Rule 32 of the Federal Rules of Criminal Procedure. Furthermore, the entire sentencing hearing is recorded, so that a transcript is available for later reference. Moreover, if serious error exists in the information given to the judge, the sentence itself is invalid, and the defendant must be resentenced on the basis of accurate information. *See* Rule 35 of the Federal Rules of Criminal Procedure; 28 U.S.C. § 2255; *see also United States* v. *Tucker, supra.*

4. *The Right to an Adequate Record Of the Proceeding*

The Court below found that a tape recording of the proceeding was constitutionally adequate "provided that the recordings are of sufficient quality to enable the record to be reduced to writing." 576 F.2d at 1284. In the federal system, Congress has mandated that "[a] full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commissioner may retain of the proceeding." 18 U.S.C. § 4208(f). In practice, the Commission tape-records every hearing and furnishes copies of the tapes to inmates requesting them. *See* 28 C.F.R. § 2.55.

Providing a high-quality tape recording of a parole hearing satisfies minimum constitutional standards. When, as in the federal, Nebraska, and virtually all other state parole systems, the parole scheme depends upon analysis of prescribed facts and application of discrete criteria, an accurate record of the parole hearing is indispensable for

both inmates and paroling authorities. The inmates need accurate contemporaneous recordings to determine whether any misunderstandings or misapplications of parole criteria occurred. Paroling authorities need records to resolve factual disputes promptly and efficiently, to decide appeals when authorized, and to ensure that its staff conducts hearings fairly, competently, and uniformly. In short, the parole board must have the means to review its own performance.

CONCLUSION

For the reasons stated above, *amici* respectfully request that this Court recognize the liberty interest inherent in the parole release decision and grant inmates the procedural protections required by the Due Process Clause as outlined in this brief.

Respectfully submitted,

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Appendices

APPENDIX A

STATUTES INVOLVED

Parole Commission And Reorganization Act (Title 18, United States Code)

§ 4203. Powers and duties of the Commission

(a) The Commission shall meet at least quarterly, and by majority vote shall—

(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter . . . .

* * * *

(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to—

(1) Grant or deny an application or recommendation to parole any eligible prisoner;

(2) impose reasonable conditions on an order granting parole . . . .

* * * *

(c) The Commission, by majority vote, and pursuant to rules and regulations—

(1) may delegate to any Commissioner or commissioners powers enumerated in subsection (b) of this section;

(2) may delegate to hearing examiners any powers necessary to conduct hearings and proceedings, take sworn testimony, obtain and make a record of pertinent information, make findings of probable cause and issue subpoenas for witnesses or evidence

in parole revocation proceedings, and recommend disposition of any matters enumerated in subsection (b) of this section, except that any such findings or recommendations shall be based upon the concurrence of not less than two hearing examiners . . . .

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

* * * *

(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole

to the authorities of any State otherwise entitled to his custody.

* * * *

§ 4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrepect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided*, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or

any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

§ 4207. Information considered

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

§ 4208. Parole determination proceeding; time

(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole

determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

(c) Subparagraph (2) of subsection (b) shall not apply to—

(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

(d) (1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner may consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exclude attorneys as a class.

(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding.

(h) In any case in which release on parole is not granted, subsequent parole determination proceedings shall be held not less frequently than:

(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.

§ 4215. Reconsideration and appeal

(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may have the decision reconsidered by submitting a written application to the regional commissioner not later than thirty days following the date on which the decision is rendered. The regional commissioner, upon receipt of such application, must act pursuant to rules and regulations within thirty days to reaffirm, modify, or reverse his original decision and shall inform the applicant in writing of the decision and the reasons therefor.

(b) Any decision made pursuant to subsection (a) of this section which is adverse to the applicant for reconsideration may be appealed by such individual to the National Appeals Board by submitting a written notice of appeal not later than thirty days following the date on which such decision is rendered. The National Appeals Board, upon recipt of the appellant's papers, must act pursuant to rules and regulations within sixty days to reaffirm, modify, or reverse the decision and shall inform the appellant in writing of the decision and the reasons therefor.

(c) The National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General filed not later than thirty days following the decision and, by majority vote, shall reaffirm, modify, or reverse the decision within sixty days of the recipt of the Attorney General's request. The Board shall inform the Attorney General and the individual to whom the decision applies in writing of its decision and the reasons therefor.

Regulations of United States Parole Commission
(Title 28, Code of Federal Regulations)

§ 2.11 Application for parole.

(a) A federal prisoner (including a committed youth offender or prisoner sentenced under the Narcotic Addict Rehabilitation Act) desiring to apply for parole shall execute an application form as prescribed by the Commission. Such forms shall be available at each federal institution and shall be provided to prisoners eligible for parole. Prisoners committed under the Federal Juvenile Delinquency Act shall be considered for parole without application and may not waive parole consideration. A prisoner who receives an initial hearing need not apply for subsequent hearings.

(b) A prisoner may knowingly and intelligently waive any parole consideration on a form provided for that purpose. If a prisoner waives parole consideration, he may later apply for parole and may be heard during the next visit of the Commission to the institution at which he is confined, provided that he has applied at least 45 days prior to the first day of the month in which such visit of the Commission occurs.

(c) A prisoner who fails to submit either an application for parole or a waiver form shall be referred to the Commission's representatives by the chief executive officer of the institution. The prisoner shall then receive an explanation of his right to apply for parole at a later date.

(d) In addition to the above procedures relating to parole application, all prisoners prior to initial hearing shall be provided with an inmate background statement by the Bureau of Prisoners for completion by the prisoner.

§ 2.12 Hearing procedure.

(a) Whenever feasible, the initial parole determination hearing for an eligible prisoner shall be held at least 30 days prior to the expiration of his minimum sentence, or in the case of a prisoner with no minimum sentence within one-hundred and twenty days after his reception at a federal institution. The prisoner shall, at least 30 days prior to the hearing, be provided with written notice of the time and place of the hearing and of his right to review the documents to be considered by the Commission as provided by § 2.55. A prisoner may waive such notice, except that if such notice is not waived, the case shall be continued to the time of the next regularly scheduled proceeding of the Commission at the institution in which the prisoner is confined.

(b) A prisoner may be represented at a hearing by a person of his choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement.

(c) No interviews with the Commission or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with

Commission procedures. Hearings shall not be open to the public.

§ 2.13 Initial hearing.

(a) An initial hearing shall be conducted by a panel of two hearing examiners. The examiners shall discuss with the prisoner his offense severity rating and salient factor score as described in § 2.20, his institutional conduct and, in addition, any other matter the panel may deem relevant. At the conclusion of the hearing, the panel shall orally inform the prisoner of its recommendation and, if such recommendation is for denial, of the reasons therefor.

(b) Written notice of the official decision, including the decision to refer under § 2.17 or § 2.24, shall be mailed or transmitted to the prisoner within 21 days of the date of the hearing, except in emergencies.

(c) If parole is denied, the prisoner shall also receive in writing the reasons therefor. In accordance with 18 U.S.C. 4206, reasons for parole denial may include the following, with further specification as appropriate.

(1) The prisoner has not substantially observed the rules of the institution or institutions in which confined;

(2) Release, in the opinion of the Commission, would depreciate the seriousness of the offense or promote disrespect for the law; or

(3) Release, in the opinion of the Commission, would jeopardize the public welfare.

In lieu of, or in combination with, the above reasons the prisoner shall be furnished with a guidelines evaluation statement containing his offense severity rating and salient factor score (including the points credited on each item of such score) as described in § 2.20, as well as the specific factors and information relied upon for any decision to continue such prisoner for a period outside the range indicated by the guidelines.

(d) A full and complete record of every hearing shall be retained by the Commission. Upon a request, pursuant to § 2.55, the Commission shall make available to any eligible prisoner such record as the Commission has retained of the hearing.

§ 2.14 Subsequent hearings.

(a) Subsequent hearings shall be conducted under the same procedure as initial hearings, except that the primary purpose of a subsequent hearing shall be to focus on any developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing.

(b) During the month preceding a regularly scheduled institutional review hearing the case may be reviewed by an examiner panel on the record (including a current institutional progress report). If the recommendation is to grant parole, and the Regional Commissioner concurs, no hearing shall be conducted. However, cases in which the previous continuance has been limited by statute or Commission policy shall be placed directly on the docket for hearing.

§ 2.18 Granting of parole.

The granting of parole to an eligible prisoner rests in the discretion of the United States Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a

reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).

§ 2.19 Information considered.

(a) In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) Reports and recommendations which staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Presentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney; and

(5) Reports of physical, mental, or psychiatric examination of the offender.

(b) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decisionmaking without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at § 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate. . . .

§ 2.22 Communication with the Commission.

Attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Commission must submit a written request to the appropriate regional office setting forth the nature of the information to be discussed. Such personal interview may be conducted by Staff Personnel in the regional offices. Personal interviews, however, shall not be held by an examiner or member of the Commission except under the Commission's appeals procedures.

§ 2.25 Regional appeal.

(a) A prisoner or parolee may submit to the responsible Regional Commissioner a written appeal of a decision to grant, rescind, deny, or revoke, parole, except that any appeal of a Commission decision pursuant to § 2.17 shall be pursuant to § 2.27. This appeal must be filed on a form provided for that purpose within thirty days from the date of entry of such decision.

(b) The Regional Commissioner may affirm the decision, order a new institutional hearing on the next docket, order a regional appellate hearing, reverse the decision, or modify a continuance or the effective date of parole. Reversal of a decision or the modification of a decision by more than one hundred eighty days whether based upon the record or following a regional appellate hearing shall require the concurrence of two out of three Regional Commissioners. Decisions requiring a second or additional vote shall be referred to other Regional Commissioners on a rotating basis as established by the Chairman.

(c) Regional appellate hearings may be held at the regional office before the Regional Commissioner. If a regional appellate hearing is ordered, attorneys, relatives and other interested parties who wish to appear must submit a written request to the Regional Commissioner stating their relationship to the prisoner and the general nature of the information they wish to present. The Regional Commissioner shall determine if the requested appearances will be permitted. The prisoner shall not appear personally.

(d) Within 30 days of receipt of the appeal, except in emergencies, the Regional Commissioner shall inform the applicant in writing of the decision and the reasons therefor.

(e) If no appeal is filed within thirty days of the date of the entry of the original decision, such shall stand as the final decision of the Commission.

(f) Appeals under this section may be based upon the following grounds:

(1) The reasons given for a denial or continuance do not support the decision; or

(2) There was significant information in existence but not known at the time of the hearing.

§ 2.26 Appeal to National Appeals Board.

(a) Within 30 days of entry of a Regional Commissioner's decision under § 2.25, a prisoner or parolee may appeal to the National Appeals Board on a form provided for that purpose. However, any matter not raised on a regional level appeal may not be raised on appeal to the National Appeals Board. The National Appeals Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) The National Appeals Board shall act within 60 days of receipt of the appellant's papers, to affirm, modify, or reverse the decision.

(c) Decisions of the National Appeals Board shall be final.

§ 2.28 Reopening of cases.

Notwithstanding the appeal procedure of § 2.25 and § 2.26, the appropriate Regional Commissioner may, on his own motion, reopen a case at any time upon the receipt of new information of substantial significance and may then take any action authorized under the provisions and procedures of § 2.25. Original jurisdiction cases may be reopened upon the motion of the appropriate Regional Commissioner under the procedures of § 2.17.

§ 2.29 Release on parole.

(a) A grant of parole shall not be deemed to be effective until a certificate of parole has been delivered to the prisoner.

(b) Parole release dates generally will not be set more than six months from the date of the parole hearing. Residence in a Community Treatment Center as part of a parole release plan generally shall not exceed one hundred and twenty days. An effective date of parole shall not be set for a Saturday, Sunday, or a legal holiday.

(c) When an effective date of parole has been set by the Commission, release on that date shall be conditioned upon continued good conduct by the prisoner and the completion of a satisfactory plan for parole supervision. The appropriate Regional Commissioner may, on his own motion, reconsider any case prior to release and may reopen and advance or retard a parole date. A parole grant may be retarded for up to one hundred and twenty days without a hearing for development and approval of release plans.

§ 2.55 Disclosure of records.

(a) Prior to an initial parole hearing conducted pursuant to § 2.13 or any review hearing thereafter, a prisoner may review reports and other documents in the institution file which will be considered by the Commission at his parole hearing. These documents are generally limited to official reports bearing on the prisoner's offense behavior, personal history, and institutional progress. Review of such reports shall be permitted by the Bureau of Prisons pursuant to its regulations within seven days of a request by the prisoner, except that in the case of reports which must be sent to the originating agency for clearance pursuant to paragraph (c) of this section, a reasonable amount of time shall be permitted to obtain such clearance. Copies of reports and documents

may be furnished under applicable Bureau of Prisons regulations.

(b) A report shall not be disclosed to the extent it contains:

(1) Diagnostic opinions which, if known to the prisoner, could lead to a serious disruption of his institutional program;

(2) Material which would reveal sources of information obtained upon a promise of confidentiality; or

(3) Any other information which, if disclosed, might result in harm, physical or otherwise, to any person. The term "otherwise" shall be deemed to include the legitimate privacy interests of such person under the Privacy Act of 1974.

(c) It shall be the duty of the agency which originated any report or document referred to in paragraph (a) of this section to determine whether or not to apply any of the exceptions to disclosure set forth in paragraph (b) of this section. If any report or portion thereof is deemed by the originating agency to fall within an exception to disclosure, such agency shall prepare and furnish for inclusion in the institution file a summary of the basic contents of the material to be withheld, bearing in mind the need for confidentiality or impact on the prisoner, or both. In the case of a report prepared by an agency other than the Bureau of Prisons, the Bureau shall refer such report to the originating agency for a determination relative to disclosure, if the report has not been previously cleared or prepared for disclosure.

(d) Upon request by the prisoner, the Commission shall make available a copy of any record which it has retained of a parole or parole revocation hearing pursuant to 18 U.S.C. 4208(f).

(e) Except for deliberative memoranda referred to in paragraph (f) of this section, reports or documents received at regional offices which may be considered by the Commission at any proceeding shall be forwarded for inclusion in the prisoner's institutional file so that he may review them pursuant to paragraph (a) of this section. Such reports will first be referred by the Commission to originating agencies pursuant to paragraph (c) of this section for a determination relative to disclosure if the report has not previously been cleared or prepared for disclosure.

(f) Duplicate copies of records in a prisoner's institutional file as well as deliberative memoranda among Commission Members or staff which do not contain new factual information relative to the parole release determination are retained in Parole Commission regional office files following initial hearing. Records maintained in these files shall be made available to prisoners, parolees, mandatory releasees, their authorized representative and members of the public upon written request in accordance with applicable law and Department of Justice regulations at 28 CFR Part 16, Subparts C & D. The Commission reserves the right to invoke statutory exemptions to disclosure of its files in appropriate cases under the Freedom of Information Act or Privacy Act text provisions and Alternate Means of Access.

APPENDIX B

SURVEY OF FEDERAL AND STATE PAROLE LAWS*

	In-person Hearing	Right to Representative at Hearing	Advance Notice of Hearing Date	Statutory Criteria For Parole	Verbatim Recording of Hearing	Written Statement for Denial of Parole	Access to Files	Right to Reply
UNITED STATES	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
ALABAMA	Yes	No		Yes	No	Yes		
ALASKA	Yes	Yes		Yes	No	Yes	Yes	
ARIZONA	Yes	Yes		Yes	No	Yes		
ARKANSAS	Yes	Yes		Yes	No	Yes	Yes	
CALIFORNIA	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
COLORADO	Yes	No		Yes	Yes	Yes		
CONNECTICUT	Yes	No		Yes	Yes	Yes		
DELAWARE	Yes	Yes	Yes	Yes	No	Yes		
FLORIDA	Yes	No	Yes	Yes	Yes	Yes		
GEORGIA	No			Yes	No	Yes		
HAWAII	Yes	Yes		Yes	Yes	Yes		
IDAHO	Yes	Yes		Yes	Yes	No		
ILLINOIS	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
INDIANA	Yes	No		Yes	**	No		
IOWA	Yes	No		Yes	No	Yes		

	In-person Hearing	Right to Representative at Hearing	Advance Notice of Hearing Date	Statutory Criteria For Parole	Verbatim Recording of Hearing	Written Statement for Denial of Parole	Access to Files	Right to Reply
KANSAS	Yes	Yes		Yes	No	No	Yes	
KENTUCKY	Yes	Yes		Yes	No	Yes		
LOUISIANA	Yes	Yes		Yes	No	Yes	Yes	
MAINE	Yes	Yes			No	Yes		
MARYLAND	Yes	No	Yes	Yes	Yes	Yes	Yes	
MASSACHUSETTS	Yes	No		Yes	No	Yes		
MICHIGAN	Yes	Yes		Yes	No	Yes		
MINNESOTA	Yes	Yes	Yes	Yes	Yes	Yes		
MISSISSIPPI	Yes	No	Yes	Yes	Yes	Yes		
MISSOURI	Yes	No		Yes	Yes	Yes		
MONTANA	Yes	Yes		Yes	No	Yes		
NEBRASKA	Yes	Yes		Yes	Yes	Yes		
NEVADA	Yes	No		Yes	No	No		
NEW HAMPSHIRE	Yes	Yes		Yes	Yes	Yes		
NEW JERSEY	Yes	Yes		Yes	No	Yes	Yes	Yes
NEW MEXICO	Yes	No		Yes	No	Yes	Yes	
NEW YORK	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
NORTH CAROLINA	Yes	Yes		Yes	No	Yes		
NORTH DAKOTA	Yes	Yes		Yes	Yes	Yes	Yes	
OHIO	Yes	No		Yes	No	Yes		
OKLAHOMA	Yes	Yes		Yes	No	No		
OREGON	Yes	No	Yes	Yes	Yes	Yes	Yes	
PENNSYLVANIA	Yes	Yes	Yes	Yes	No	Yes		
RHODE ISLAND	Yes	Yes		Yes	No	Yes		
SOUTH CAROLINA	Yes	Yes		Yes	Yes	Yes		
SOUTH DAKOTA	Yes	Yes		Yes	No	No	No	
TENNESSEE	Yes	Yes	Yes	Yes	No	Yes		
TEXAS	No	No		Yes	No	Yes		
UTAH	Yes	Yes	Yes	Yes	Yes	Yes		
VERMONT	Yes	Yes		Yes	Yes	Yes		
VIRGINIA	Yes	No		Yes	No	Yes	Yes	Yes
WASHINGTON	Yes	No			No	Yes		
WEST VIRGINIA	Yes	No	Yes	Yes	Yes	Yes	No	
WISCONSIN	Yes			Yes	Yes	Yes		
WYOMING	Yes	Yes			Yes	Yes		
Total: Yes	49	29	14	48	23	45	14	6
No	2	20	0	0	27	6	2	0
Silent	0	2	37	3	1	0	35	45

Source: State statutes cited in Appendix C; V. O'Leary & K. Hanrahan, *Parole Systems in the United States* (3d ed. 1976).

Notes: * A blank space indicates that the pertinent state statute has no express provision concerning this procedural protection. In practice, it is believed that several of these procedures are afforded in a number of states.

** Although the statute is silent on this question, the O'Leary and Hanrahan study indicates that a verbatim recording is available at least to female prisoners.

APPENDIX C

OFFICIAL CITATIONS TO FEDERAL AND STATE PAROLE LAWS

UNITED STATES	18 U.S.C. § 4201 *et seq*; 28 C.F.R. § 2.01 *et seq*. (1977).
ALABAMA	ALA. CODE tit. 42, § 7 (Cum. Supp. 1973), ALA CODE tit. 42, § 8 (1959).
ALASKA	ALASKA STAT. §§ 33.15.080, 33.15.140 (1978).
ARIZONA	ARIZ. REV. STAT. §§ 31-411, 31-412 (Cum. Supp. 1978-1979).
ARKANSAS	ARK. STAT. ANN. §§ 43-2804, 43-2808, 43-2819, 43-2829 (1977).
CALIFORNIA	CAL. PENAL CODE §§ 3041, 3041.5, 3042 (West 1970, Cum. Supp. 1977, Cum. Supp. 1978).
COLORADO	COLO. REV. STAT. § 17-1-201 (Cum. Supp. 1976)[1].
CONNECTICUT	CONN. GEN. STAT. ANN. § 54-125 (West Cum. Supp. 1978)[2].
DELAWARE	DEL. CODE tit. 11, §§ 4346, 4353 (1975), DEL. CODE tit. 11, §§ 4347, 4350 (Cum. Supp. 1977).
FLORIDA	FLA. STAT. ANN. §§ 947.135, 947.16, 947.17, 947.18 (West 1973, Cum. Supp. 1978).
GEORGIA	GA. CODE ANN. § 77-514, 77-516 (1973).
HAWAII	HAW. REV. STAT. § 353-67, 353-69 (1976).
IDAHO	IDAHO CODE § 20-223 (Cum. Supp. 1978).
ILLINOIS	ILL. ANN. STAT. ch. 38, §§ 1003-3-4, 1003-3-5 (Smith-Hurd Cum. Supp. 1978).
INDIANA	IND. CODE ANN. § 11-1-1-9 (Burns Cum. Supp. 1978).

IOWA	IOWA CODE ANN. §§ 906.4, 906.5, 906.7 (West Spec. Pamphlet 1978).
KANSAS	K.S.A. § 22-3711 (1974), K.S.A. § 22-3717 (Cum. Supp. 1977).
KENTUCKY	KY. REV. STAT. § 439.340 (Cum. Supp. 1978).
LOUISIANA	LA. REV. STAT. ANN. §§ 15:574.3, 15:574.4 (West Cum. Supp. 1978).
MAINE	ME. REV. STAT. tit. 34, § 1553 (1978).
MARYLAND	MD. ANN. CODE art. 41, §§ 111, 112, 114 (1978).
MASSACHUSETTS	MASS. GEN. LAWS. ANN. ch. 127, §§ 130, 134, 136 (West 1972).
MICHIGAN	MICH. STAT. ANN. §§ 28.2303, 28.2305 (1978).
MINNESOTA	MINN. STAT. ANN. § 243.05 (West Cum. Supp. 1978)[3].
MISSISSIPPI	MISS. CODE ANN. § 47-7-17 (Cum. Supp. 1978).
MISSOURI	MO. ANN. STAT. § 549.261 (Vernon Cum. Supp. 1978).
MONTANA	MONT. REV. CODES ANN. §§ 94-9832, 94-9835 (1969).
NEBRASKA	NEB. REV. STAT. § 83-192 (1976).
NEVADA	NEV. REV. STAT. § 213.1099 (1977).
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 651:45 (1974).
NEW JERSEY	N.J. STAT. ANN. §§ 30:4-123.19, 30:4-123.25 (West 1974).
NEW MEXICO	N.M. STAT. ANN. §§ 41-17-18, 41-17-24, 41-17-27 (1972).
NEW YORK	N.Y. EXEC. LAW § 259(i) (McKinney Supp. Pamphlet 1978).

NORTH CAROLINA	N.C. GEN. STAT. § 148-57.1 (1978).
NORTH DAKOTA	N.D. CENT. CODE §§ 12-59-04, 12-59-05 (1976).
OHIO	OHIO REV. CODE ANN. § 2967.03 (Page 1975).
OKLAHOMA	OKLA. STAT. ANN. tit. 57, §§ 332.8, 354 (West 1969), OKLA. STAT. ANN. tit. 57 ch. 7 app. § 332 (West Cum. Supp. 1978-1979).
OREGON	OR. REV. STAT. § 144.125 (1977).
PENNSYLVANIA	PA. STAT. ANN. tit. 61 §§ 331.21, 331-22 (Purdon 1964, Cum. Supp. 1978-1979)[4].
RHODE ISLAND	R.I. GEN LAWS §§ 13-8-14, 13-8-24 (Cum. Supp. 1977)[5].
SOUTH CAROLINA	S.C. CODE §§ 24-21-50, 24-21-640 (1977).
SOUTH DAKOTA	S.D. COMPILED LAWS ANN. §§ 23-60-2, 23-60-12 (1969).
TENNESSEE	TENN. CODE ANN. § 40-3614 (Cum. Supp. 1978).
TEXAS	TEX. CODE CRIM. PROC. ANN. art. 42.12 § 15. (Vernon Supp. Pamphlet 1978).
UTAH	UTAH CODE ANN. §§ 77-62-3, 77-62-13, 77-62-14 (1953).
VERMONT	VT. STAT. ANN. tit. 28, §§ 501, 502 (Cum. Supp. 1978).
VIRGINIA	VA. CODE § 53-251 (1978)[6].
WASHINGTON	WASH. REV. CODE ANN. § 9.95.110 (1977).
WEST VIRGINIA	W.VA. CODE § 62-12-13 (1977)[7].
WISCONSIN	WIS. STAT. ANN. § 57.06 (West Cum. Supp. 1978-1979)[8].
WYOMING	WYO. STAT. § 7-13-402 (1977).

Notes:

[1] *Johnson* v. *Heggie*, 362 F.Supp. 851 (D. Colo. 1973).

[2] *Dumschat* v. *Board of Pardons, State of Conn.*, 432 F. Supp. 1310 (D.C. 1977).

[3] *State* v. *Schoen*, No. 218 (Minn. Sup. Ct. Sept. 22, 1978).

[4] *Bunner* v. *Comm'r., Bd. of Probation and Parole*, 379 A.2d 1368 (Pa. Commw. Ct. 1977).

[5] *State* v. *Ouimette*, 367 A.2d 704 (R.I. 1976).

[6] *Franklin* v. *Shields*, 399 F.Supp. 309 (W.D.Va.), *aff'd in part, rev'd in part*, 569 F.2d 784 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1003 (1978).

[7] *Sites* v. *McKenzie*, 423 F.Supp. 1190 (N.D. W.Va. 1976).

[8] *Tyznik* v. *Dept. of Health and Social Services*, 238 N.W.2d 66, 71 Wis.2d 169 (1976).